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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934.

**No. 13, Original**

THE UNITED STATES OF AMERICA, *Plaintiff*,

*vs.*

THE STATE OF OREGON, *Defendant*.

## REPLY BRIEF FOR THE STATE OF OREGON to Brief for the United States in Support of Its Exceptions to the Master's Report

## STATEMENT*

Plaintiff's brief concedes that the Executive Order of August 18, 1908, "was not intended to affect any lands other than those of the United States". (Plff's Brief, p. 2.) The United States at the commencement of this suit was not an upland owner on the Narrows or on Mud Lake. See Report plates opposite pages 8 and 10, nor does it now have any lands bordering on such bodies of water.

Oregon has always by judicial decision asserted title to ordinary high water line of the beds of navigable lakes; and the legislation of 1917 referred to must be deemed to have been enacted for additional purposes. Report, Supp. p. vi.

*In this Reply Brief the Joint Abstract of Record is abbreviated as in the opening brief: Abs. Page and line citations to such abstract are abbreviated as: p. and l. respectively. The Report of the Special Master is referred to as: Report. Whether it is volume 1 or 2 is stated.

The powers given by the acts of 1921 and 1923 as to preferential rights of purchase are exercisable by the state at its option but do not constitute obligatory covenants to buy or sell. The disposal to persons who had the qualifications of homestead entrymen was an attempt to aid certain persons who in the fall and winter months have squatted upon small areas within the western confines of Malheur Lake, which became bare in recent years for a portion of the season, due to an unusual lack of precipitation and possibly other causes.

These settlers squatted under a claim of right, not permissively as the plaintiff asserts. (Plff's Brief, p. 2, l. 29; p. 5, l. 7.) (Abs. p. 579, l. 25.)

As asserted in its opening brief herein, defendant claims that the riparian owners and settlers should be brought in herein and not submitted to the proposed slow freezing out process of litigation in the District Court.

The plaintiff's position is stated as follows:

> "In this action the United States asserted that the Reservation was not *navigable water* when Oregon was admitted to the Union in February, 1859, and hence the title to the *beds of the lakes* remained in the United States and is still the property of the United States."

(Plff's Brief, p. 5). This would seem to be a plain assertion that the waters are non-navigable waters, and a concession that the area involved herein the *beds* of non-navigable lakes.

## COMPLAINANT'S EXCEPTION I.

In Exception I, complainant (plaintiff in title of this case), takes the position that the correctness of the Neal line is "not an issue" thereby reiterating the position taken by government's counsel on the trial. This would

seem to be a concession that the line is correct, though we have the peculiar spectacle of the government's attempted challenge of the correctness of the line in Exceptions II and III.

Oregon asserts the line is not in issue on other grounds, the reasons for which are fully stated, infra.

## COMPLAINANT'S EXCEPTION II.

The Special Master correctly stated a principle of law that "the argument of the State of Oregon respecting the effect of grants of the United States to upland proprietors bordering on the Neal meander line rested upon the correctness of that line" (Report, p. 26).

The United States has parted with ownership of the uplands on Malheur Lake to the extent of approximately 79.20% of the said lands bordering on the Neal line; to *all* of the uplands on the *Narrows Division and Mud Lake*; to 15.08% on Sand Reef Division; and 12.09% on Harney Lake (Report, p. 10). Malheur Lake, the Narrows and Mud lake are the valuable part of the area involved.

Oregon's first defense is that the area involved underlay navigable waters and so inured to the state upon its admission into the Union; its second defense is that the meander line was correctly run, grants and patents were made without reservations or restrictions to lands bordering thereon and are to be construed as to their effect by local law, and under such local law, Oregon and not the riparian proprietors is the owner of the bed, to so much at least as fronts such granted or patented lands. The Master correctly concluded that the determination of the accuracy of the Neal line was directly involved and necessary to be decided.

The government's assertion in its brief that:

> "If this Court finds that the lakes are nonnavigable, Oregon has no interest therein" (Plff's Brief, p. 9).

begs the question. If this Court shall so find, (that the lakes are non-navigable) then it is necessary to determine the effect of the grants and patents of the United States and to pass on the correctness of the Neal line.

The complainant in its brief (p. 9) asserts that inasmuch as the Master has found that Oregon has no ownership within the Malheur, Harney and Sand Reef Divisions, that the Special Master's finding XIII, wherein he holds that the Neal line was correctly established and was made in good faith, and without fraud or gross error or mistake, was not necessary and should not have been made. This again begs the question; Oregon challenges the conclusion of the Special Master. (Defendant's Exceptions 97, 132, 121.) The question of the effect of grants and patents upon a correctly established meander line is squarely before this Court. It is one of the most important questions of real property law ever before this Court. It has resulted in an irreconcilable conflict of authority in the courts of this country. The gravity of the legal questions involved is apparent from the argument of government counsel before the Special Master. On page 3404 of the typewritten argument before the Master, now on file in this case, is the following statement by such counsel of the plaintiff:

> "Were it not for the fact that this probably is the most important case that the government has on its docket today, I would be willing to rest the Government's case on my previous argument."

The pertinency of this question and the law is presented in Oregon's Opening Brief herein, pp. 104-181.

On the merits of the correctness of the Neal line, the complainant asserts that the Master's finding XIII is contrary to the evidence. It is to quote Pecore's testimony on p. 185 of the Abstract.

"As far as the technical execution of Mr. Neal's work is concerned, as we found it by our retracements, and as far as the monumentation of his lines and corners was concerned, his work was excellent considering the class of work that was done by deputy contracting surveyors in 1895. Any man that would run a survey that day with the instruments and equipment that they had, and monumented the lines so that 35 years later you could find practically all of his corners within a few feet of where he said he put them, I would say that his job was well executed so far as the instrumental work was concerned."

The rest of Pecore's testimony is the testimony of a partisan witness for the Government. He called himself a cadastral engineer. Immediately after the end of this hearing he opened a law office and is now practicing law in Portland, Oregon. He made the survey in 1931 on a dry lake bed, he knew nothing of the conditions as to flags and tules in 1895 which he testifies to. (Abs. p. 186.) He admits on cross-examination that when the water in Malheur lake rose to elevation 4093 it would extend out through any flags and tules growing on lands below that elevation. The conditions were no different than in the many cases cited in Oregon's opening brief herein, and in fact the meader line of Wolf Lake in *Hardin* v. *Jordan* and *Mitchell* v. *Smale* was run through territory exactly of the same nature as that of Malheur Lake. The same is true of Mud Lake in the *Holt State Bank* case, 270 U. S. 49.

There are three reasons why the complainant must accept the Neal line as accurately and correctly established:

1. It is correct as a matter of fact; and everything within it constitutes lake bed; the Government is estopped by its patents from asserting that it should have been run farther out toward the earlier surveys (See Plate opposite p. 4 of Report);

2. The Government is irrevocably committed herein to the proposition that the area involved within the meander lines constitutes the beds of lakes; and it is estopped by its own pleadings from challenging the correctness of the surveys;

3. An attempt to question the accuracy of the Neal survey herein would be a collateral attack and is not permitted.

1. The Neal line is correct as a matter of fact.

On page 54 of Defendant's Exceptions, numbered 30, subd. (a) are given the names of witnesses with citations to the page and line of the Abstract. All of these witnesses testifying on behalf of the Government show that the Neal line was run at ordinary high water line, and that at ordinarily recurring seasons of high water, the waters of the lake come up at least to such line and to some extent flood the adjacent patented upland, thus enabling such upland owners to produce hay crops, which fact in no way impairs the validity of the survey. (See cases page 39 of Oregon's Opening Brief herein.)

A period of dry years commenced in 1918, precipitation started to slacken up in 1915, and this cycle has continued up to 1933, except in the years 1921, 1922, 1923 and 1928 and even in those years the water did not fully come back. See Report: Vol. 2, pp. 89-94. It is impossible to read the testimony of these witnesses and arrive at any other conclusion than that arrived at by the Special Master and expressed in his finding XIII.

We are not aware of a single case in this country wherein it has been held that a meander line survey can be impeached where the evidence conclusively shows that at ordinarily recurring seasons of high water, the water of the lake or river approximately coincides with the meander line. It is only where there is a large space of land between the meander line and such water's edge, which is not covered at ordinary high water, that an inquiry may be

instituted by the land department after notice to all persons interested, to determine whether the meander line can be challenged on the ground of fraud, gross error or mistake.

Plaintiff asserts that settlers within the Neal line engaged in agriculture and stock raising.

Except for one Thompson, the evidence conclusively establishes that the only agricultural pursuit when the water lowered sufficiently was the cutting first of tules, then as the years passed on and the dry cycle came, some of the tule were burned and a species of wild hay, mostly sugar grass (Exh. 52, p. 40), took its place in part; a little salt grass grew on the higher knolls from which the water receeded during the dry season in later years; this hay was put up in stacks and fed to cattle in the winter time; originally thousands of head of cattle went into the tules in winter time for shelter, ate the tender tips of tules and such wild grasses as found opportunity to spring up. Thompson once tried some grain cutting on his knoll. The experiment was not repeated until the summer of 1931, 1932 and 1933. Whatever evidence there is of agricultural pursuits was chiefly testified to by Government counsel in their leading questions which are put in question and answer and not in narrative form in the Joint Abstract. The witnesses listed on pages 47-48 of Defendant's Exceptions, under Exception 47 where page and line references are given, show that the waters of the lakes rose high enough to cover the knolls, the so called islands, consistently, regularly and yearly, permitting tules and wild grasses to grow on such knolls, which were cut for hay, and that the nature of the vegetation was such that it required the waters in the lake to rise high enough to stand over such knolls for a long period each growing season to produce such crops. (Abs. p. 448, l. 39-41.)

The settlers had a meeting over the question of the Neal line. (Abs. p. 209, l. 25-30.) They sent a committee with Mr. Neal on his survey to see that he ran his line right. (Abs. p. 238, l. 3-5.) Turner saw Neal run his line. He said there was no trouble about the line that he knew of. (Abs. p. 214, l. 10.) There was more or less discussion in h[illegible] household about it. (Abs. p. 215, l. 24.) As to the numerous settlers which plaintiff claims lived within the Neal line (A. R. 224-225), it is an exaggerated statement to say that they lived there. They put up a little shack, stayed there when they cut their hay, fed it to their cattle in the winter and then moved out until the haying season began. The shacks were put up on the little knolls that extended a few inches above the water; and sometimes they could not get in there to cut hay at all. It was largely tules in the early days. Not a single one of the so-called settlers were called, referred to on page 13 of Complainant's Brief on its exceptions, except the Dunns, Scott Haley and W. A. Campbell. Every one of them were "dry" witnesses, hoping to establish reliction by subsidence of water so as to enlarge the areas about the knolls they squatted on. The evidence is uncontradicted and unanimous that all the "settlers" so called moved off of the knolls when the spring break-up came and did not return until time for haying which began from July to October according to the amount of water, and sometimes there was so much that they couldn't get any hay at all.

The special instructions to J. H. Neal, Exhibit 38, directed him to establish the new meander line at "mean high water mark" and to observe the provisions of the Manual of 1894, (Abs. p. 177, l. 8; p. 178, l. 28). This manual provided for the meandering of "all lakes . . . of the area of twenty-five acres and upwards." (Abs. p. 178, l. 42.) These instructions have been the same from the beginning. Manual of Instructions dated Feb. 22, 1855; 1 Lester Land

Laws, p. 714. Mr. Justice White, whose dissenting opinion seems to have been followed by the Master herein, stated in the *Kean* case that the approval of this manual by Congress constituted a legislative interpretation that lakes of the area of 25 acres and upwards are navigable. Act of May 30, 1862, 19 Stat. 409; Manual of May 3, 1881, January 1, 1890 and June 30, 1894, p. 57. Manual of 1894 approved by Congress Aug. 15, 1894, 28 Stat. 285. See discussion in *Kean* v. *Calumet Canal Co.*, 190 U. S. 452, 496.

J. H. Neal reported in his field notes, which were approved, after the survey had been checked in the field by a special agent, (Exh. X-10), that he established his meander line at mean high water mark and also that he set *each* of his *meander corners at mean high water mark.*

In Webster's New International Dictionary, Second Edition, the word "mean" is defined as "Occupying a position about midway between extremes or near the average or norm." and again as "Occupying a middle position; occurring between the limits or extremes; intermediate."

40 C. J. 18 defines it as "A middle between two extremes" citing *State* v. *Scott,* 89 Wash. 63, 73 where it is said: "The term mean low tide signifies the mean or average level of the low tides, including both the long and the short daily runout." This refers to the neap tides. From these authorities we should judge that mean high water is the average of the high waters as they usually occurred, the average of the ordinary high waters. *East Boston Co.* v. *Commonwealth,* 203 Mass. 68, 72.

The meaning of the term may become important in determining what is the *bed* of the lakes in the case at bar as that term is used in plaintiff's complaint. This Court struggled with the question of determining what is the bed of a stream in *Howard* v. *Ingersoll,* 13 How. 381, 415, 427-8, the Justices not agreeing. This case is cited and quoted in *Sun Dial Ranch Co.* v. *May Land Co.,* 61 Or. 205, 213. In

*Alabama* v. *Georgia*, 23 How. 505, 515; this Court seems to arrive at a more satisfactory definition, and it was quoted and approved in *Oklahoma* v. *Texas*, 260 U. S. 606, 631. But lakes without currents do not denude the shores of vegetation. The courts are here speaking of rivers and the criterion of keeping the area "practically bare of vegetation by the wash of the waters of the river from year to year in their onward course" is a test clearly inapplicable to lakes. In *Barr* v. *Spalding*, 46 Fed. (2nd) 798, 800 (9), we find the District court holding the bed of a river includes the shores and embraces all that part of the river below "the ordinary and usual high water mark."

In the case at bar we have two high water marks, the *salt grass rim* around the lake (see evidence listed under witnesses, Defendant's Exception 60, subd. (a), p. 54, and the *water mark on the rock in Springer's Spring* at elevation 4094.6, which evidence is analyzed in our Opening Brief, pp. 44-47.

It may be urged that the presence of water in the north and south sides of Malheur Lake has left no real water mark. This is the situation in innumerable shallow lakes upon the outer edge of which vegetation grows in the summertime. The Oregon legislature asserts the ownership and sovereignty of the state not only between high and low water marks but also between ordinary high and low water lines. (Amended Answer, page 34, Section 1.) The Oregon legislature has also asserted ownership to lands which are covered at ordinary high water at ordinary recurring seasons and that lands shall not be deemed to be relicted lands where the waters of the lakes have not permanently receded therefrom at ordinary high water periods. (Amen. Ans. p. 35, Sec. 3.) This is in conformity with the general rules of law.

It is well settled that the point to which the water usually rises in an ordinary season of high water is the *true*

*meander line.* It constitutes the *high water mark. Railroad Company* v. *Schurmeir,* 7 Wall. 272, 286-7; *Mitchell* v. *Smale,* 140 U. S. 406, 413; *State* v. *Imlah,* 135 Or. 66, 72; *Johnson* v. *Knott,* 13 Or. 308, 310-311; *Oregon* v. *Portland Gen. Elec. Co.,* 52 Or. 502, 533; *Cawlfield* v. *Smyth,* 69 Or. 41, 45; *Sun Dial Ranch* v. *May Land Co., supra,* p. 216.

In *Churchill Company* v. *Kingsbury,* 178 Cal. 554, where the question arose as to the ownership of a wide strip which was covered with marsh grass and other aquatic vegetation and exceedingly valuable for forage and which was uncovered during the dry season and covered with the waters of Lower Klamath Lake of Oregon and California during normal seasons of high water which high water stages of the lake spread out through such grasses and vegetation, the court held that such entire strip was a part of the *bed* of the lake and owned by the state. See also *State* v. *Gerbing,* 56 Fla. 603, 610, 22 L. R. A. (N. S.) 337.

In *Richards* v. *Page Investment Co.,* 112 Or. 507, 520, the Supreme Court of Oregon said that:

> "Ordinarily the term bank is synonymous with that high-water mark below which the title was originally in the state and not in the general government. The state as the owner of the original title did not have a mere appurtenance. It had the land between high and low-water marks and it is that land about which the present parties are contending."

On pages 54-5 of Oregon's Exceptions filed herein, Exception 60, Subd. (b) are given 25 government witnesses, with page and line reference to the Abstract, who testify that ordinary high water mark of the lake was indicated by a heavy growth or mat of salt grass, a species of vegetation described by the hydraulic engineer of the government as follows:

"Along the borders of the lake are to be found large areas of salt grass (Distichlis spicata.) This plant thrives best in moist and strongly alkaline soil . . . It may be killed by consistent flooding with stagnant water. It spreads by both seed and root stocks and forms heavy sod." Jessup Report, Plff's Exh. 52, p. 41.

The witnesses testify that this species of vegetation particularly thrived where the water rose and receded on the shore's edge during the wet and dry seasons. That it was a well known characteristic of the shore, and it was located on the shore at the Neal line, except in those portions of the lake where the overflow area of the Silvies and Blitzen river as they enter the lake have "scalded" out such grass; but even in that area this tell-tale mark could be observed here and there. And what all the witnesses saw, Neal undoubtedly saw when he established his meander line through the difficult area of such overflow on the north and south where these rivers entered the lake. It was undoubtedly one of the indications on the ground among others which aided him in determining "mean high water line" of the lake; what was clearly apparent to the ordinary person was undoubtedly apparent to the man who established the line.

Ordinarily high water mark has been spoken of by courts in seeking to ascertain where such line was on rivers, by ascertaining where running water had denuded the earth of vegetation or where the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation. On deep lakes with gravelly or rocky shores, it is easy to ascertain the limits of the bed, but in the many shallow lakes of the west, we find tules, cat tails, bull rushes, marsh grasses and other aquatic vegetation springing up in the

bed of the lakes and extending to where the lake meets dry land. How then are we to ascertain where ordinary high water mark is on lakes where the shores slope gently for rods? Can any better criterion be found than exemplified in the cases cited in our opening brief?

Neal makes some very pertinent remarks as to the area he surveyed between the earlier surveys and his new 1895 line, which was run 14 years after the Sand Reef cut through. He states that the portion surveyed by him consists of lands "formerly overflowed by Malheur Lake and portions are yet liable to overflow." Plff's Exh. 39-A, pp. 31-32; 39-B, pp. 26-27; 39-C, pp. 22-23; 39-F, p. 21; 39-G, p. 17; 39-H, p. 9; 39-I, p. 19; 39-J, p. 19; 39-K, p. 16.

These observations of Mr. Neal clearly and indisputably show that before the Sand Reef was cut through Malheur Lake spread or extended out to the Meldrum 1875, Moore & Meldrum 1877, Meldrum 1877, Neal 1888 and Perkins 1879, surveys, (See Plff's Exh. 3; also plate opposite p. 4, Report) generally. The elevations of the meander lines of these surveys averaged from a minimum of 4095 to a maximum of 4098. (Abs. p. 139.) Surely all these surveyors cannot be in error. It furnishes proof of the highest character as to how high the waters of the lake rose to in recurring seasons of annual high water. It is clear that when the waters stood at such elevations nothing but tules grew even on the higher portions within the lake. See Plff's Exh. 3A. The Meldrum line is indisputable evidence of where the waters of the lake stood and extended at least in the spring seasons of ordinary high water, which is the criterion. And this is likewise true of the surveys of Moore & Meldrum in 1877, of Neal in 1888, of Perkins in 1879. An excellent commentary on the testimony of Pecore, who ran over a dry lake bed with an automobile in 1931, as to where he would have run the line in T. 25 S., R. 32½E. quoted on page 12 of plaintiff's brief herein, is the

fact that Neal found the waters of Malheur Lake even in 1888 extended in this township to where he established the meander line in that year. (See plate opposite page 4 of Master's Report; see also Exh. 3). And the Government accepted the 1888 Neal line as having been accurately run. This effort by the so-called expert engineer, who tried in 1931 when he surveyed a dry lake bed to say where the lake was in 1895, though he never saw the lake until 1931, and who would have this court say that much of these lands were swamp lands instead of lake bed lands, is answered by the very pertinent language of the Department of the Interior in *Oregon* v. *Porter,* 22 L. D. 146, 159 where a like attempt was made:

> "When after the lapse of more than thirty years, after the death of a generation of men, persons claiming to be assignees of the state, go out to search for lands which were swamp and overflowed in 1860, they must expect to find the burden of proof aggravated but not shifted; especially if the lands they may select be not swamp but the productive farms and healthy homes of industrious citizens"

So engineers like Pecore who saw the lake for the first time in 1931, who attempt to convince this Court that large areas inside the Neal line were swamp and overflowed land in 1895 instead of the bed of a lake, should have no weight.

Even George Marshall who was a partisan witness of the Government in the case at bar, and who tried to make the Master believe that he did not want lands north of the Neal line where he had squatted between it and the Meldrum line found it muddy in the fall of the year of 1895 when Neal ran his line through on the south side of the lake he said: "I rode the horse and let him (Neal) wade it." Abs. p. 211, l. 27.

It is to be noted that Perkins did not establish any meander line in 1879 in T. 26 S., R. 31 E. or westerly thereof. (See plate, Report, p. 4, Append. 3.) But everywhere else these four surveyors established a meander line on the old lake borders. The distinction between lake and marsh undoubtedly was very difficult and after the sand reef was cut in 1881 and there was a consequent lowering of the waters, the Government decided (*Armack* case, 30 L. D. 521) to extend the surveys to the then "present shore line" (Abs. p. 176, l. 33-35; p. 177, l. 6, 38-42). Neal's special instructions directed him to establish the new meander line at *mean high water mark* (Abs. p. 177, l. 38 and the general instructions were to be guided by the Manual of 1894 (Abs. p. 178, l. 28), which required him to establish the line at "ordinary mean high water mark" (Abs. p. 180, l. 14), and not "at the segregation line between dry and swamp or overflowed land, but at the ordinary high water mark of the actual margin of the . . . lake on which such swamp or overflowed lands border." (Abs. p. 181, l. 22-25.) He was also directed to state the precise relative position of islands, (Id. l. 26). Neal in his official field notes reports to the Surveyor General:

> "In defining the line between land and lake, or marsh, I have followed the special instructions of the Surveyor General for Oregon, to the best of my skill and ability."

Plff's Exh. 39-B, p. 26-27. Government engineers attempting to establish a lake on a dry lake bed in 1931, may be cocksure of what they would have done 36 years before, but their egotism outweighs their judgment.

It is apparent that when the waters in the lake rose in the spring to any particular elevation it would spread out to points around the lake to similar elevations all as shown by the contour lines on Exhibits 3 and 4 (Abs. p. 186, l.

26-37.) The government engineers could not be expected to be frank enough to concede the fact that the western part of Malheur Lake was a part of the lake, but the decisions cited in our opening brief answer their so-called expert opinions quoted on pages 11 and 12 of plaintiff's brief.

We are aware of no cause wherein it has been decided that a survey can be challenged if the waters of the lake or stream in ordinary seasons of high water rise up to or beyond and so flood the meander line. The only cases where surveys have been set aside and the upland owner's title has been held limited by the meander line instead of the water as the true boundary, have been cases where by fraud, gross error or mistake large quantities of high dry and stable lands lying between the meander line and the water's edge have been omitted from the survey and such meander line did not follow approximately the sinuosities of the shore or where the approved official survey itself shows the meander line is a traverse or boundary line and that large quantities of land lie between such traverse line and the water's edge. None of those conditions exist in the case at bar.

Hence the fact in this case that during high water seasons the waters of the lake rise up to and flooded deeded lands bordering the meander line is "infallible proof" that no lands were left unsurveyed between the meander line and the water's edge and that everything inside the Neal meander line of 1895 constitutes a part of the bed of the lakes.

J. H. Neal, in his official field notes which were approved by the General Land Office after a field investigation by a Special Agent thereof, (Abs. p. 262, Exh. x-6), and which field notes were offered in evidence herein as Plaintiff's Exhibit 39-A to 39-K, inclusive, reports that he established his meander corners, each of which he specifically describes, *in every instance* at "mean high water line of Malheur

Lake". We ask the court to examine these exhibits of the meander line surveys at the following pages wherein the surveyor's return shows the placing of the meander corner at such mean high water line.

No. 1. Malheur Lake Division.

Plff's Exh. 39-A, pp. 16, 17, 18, 19, 23, 24, 25, 26.
Plff's Exh. 39-B, pp. 14, 16, 17, 18, 19, 20.
Plff's Exh. 39-D, pp. 9, 10, 12, 13, 14, 15.
Plff's Exh. 39-E, pp. 16, 17, 18, 19.
Plff's Exh. 39-F, pp. 14, 15, 17, 19.
Plff's Exh. 39-G, pp. 10, 11, 12, 13, 14.
Plff's Exh. 39-H, p. 8.
Plff's Exh. 39-I, pp. 11, 12, 13, 15, 17.

Neal states he extended the line of the survey to the "mean high water line of Malheur Lake" to the best of his knowledge and ability and that he followed the instructions of the Surveyor General to the best of his ability. Plff's Exh. 39-A, p. 32; 39-B, p. 27; 39-C, p. 23; 39-D, p. 20; 39-E, p. 22; 39-F, p. 21; 39-I, p. 19; 39-J, p. 19.

No. 2. The Narrows Division.

Plff's Exh. 39-J, pp. 11, 12, 13, 14, 15.
Plff's Exh. 39-A, pp. 15, 16, 17, 18, 19, 23, 24, 25, 26.

Neal likewise reports that he has followed the instructions of the Surveyor General and extended the lines of the survey to the "mean high water line of Malheur Lake" to the best of his knowledge and ability. Plff's Exh. 39-J, p. 17; 39-A, p. 32.

No. 3. Mud Lake Division.

Plff's Exh. 39-J, pp. 13, 14, 15.
Plff's Exh. 39-A, pp. 16, 17.

Neal likewise reports that he endeavored to run the meander line at mean high water line, Plff's Exh. 39-J, p.

19; and that he has extended the lines of the survey to the "mean high water line of Malheur lake" to the best of his knowledge and belief. Plff's Exh. 39-A, p. 32.

No. 4. The Sand Reef Division.

Plff's Exh. 39-K, pp. 11, 12, 13, 14.

Neal reports "I have endeavored to run the meander line at the mean high water line." Plff's Exh. 39-K, p. 16.

It would seem that when the plaintiff introduced these official field notes in evidence as a part of its case, that it thereby vouched for the accuracy of the notes and the survey. See Abs. p. 239, l. 21-42, portion of the colloquy omitted by counsel from government's brief, p. 7. How it can challenge the accuracy of the Neal line without pleading or proof is beyond comprehension.

In connection with the government's contention that the Neal line is not a true line, because at places it runs through an area with swamp grasses on each side of the line, e. g. the overflow area of the Silvies and Blitzen rivers where they enter the lake, and in connection with what constitutes the bed of a lake, let us determine in the first instance what is a lake. As we have seen the average mean elevation of the Neal line is 4093 feet. (Abs. p. 174, l. 24.) Jessup the expert hydraulic engineer who worked with Mr. Pecore under whose drection the contour maps were made, Exh. 3 and 4 and gathered together the water data available, which he compiled in a report offered herein as Plff's Exh. 52, consisting of two volumes, stated:

> "A low flat alluvial area of more than 600 miles, lying between elevations 4095 and 4150 above sea level, borders Malheur Lake and Harney Lake." Exh. 52, p. 3.

Mr. Jessup also gives elevation 4095 as the flood stage elevation of Malheur Lake. Exh. 52, p. 69, 84. As shown

in our opening brief, pp. 42-49, under the discussion of Exception 18, many witnesses testified to various seasons when the water stood at elevations from 4097 to 4105.

This Court has indicated that a body of water in a basin "distinctly lower or materially different from the adjoining land would come within the category of lakes. *Chapman & Dewey Lbr. Co.* v. *St. Francis,* 232 U. S. 186, 195.

In *Humphreys-Mexia Co.* v. *Arseneaux,* 116 Tex. 603, 611, 53 A. L. R. 1147, 1153, 297 S. W. 225, 229, the court held that all water when it comes in the usual course of migration to rest permanently in a basin made by nature for that purpose, although it was flood water at one time, ceases to be flood water and becomes a "lake" or pond.

In *State of Florida,* 47 L. D. 93, 95, the Department of Interior defines a lake as follows:

> "Land covered by an apparently permanent body of water at the time of the swamp grants are not of the character contemplated by it. . . . this is true though subsequently by a recession of the waters land of a swampy character should come into existence."

In *Morrow* v. *Oregon,* 17 L. D. 571, 574, the rule is announced as follows:

> "The ruling of the Department is that the lands covered by an apparently permanent body of water at the time of swamp grants are not of the character contemplated by the grant." (i. e. the swamp land grant.)

In *State of Oregon,* 23 L. D. 178, 179, the Department stated:

> "The ruling of the Department is that the lands covered by an apparently permanent body of water at the date of the swamp grants are not of the character contemplated by the grants."

See also *C. N. Fellow*, 20 L. D. 116, 117, referring to the bed of Goose Lake which the testimony now shows is dry as is Malheur Lake.

In *John McClennen*, 30 L. D. 527, 530, the Department held a body of water in a well defined basin with water from 3 to 4 feet deep, except near the edges, though with many patches of rushes, was a lake and not a swamp.

2. The United States cannot challenge the correctness of the Neal line because:

a. The Bill of Complaint contains no allegations that the line was established by fraud, gross error or mistake;

b. There is no evidence of fraud, gross error or mistake.

c. The United States has by its pleadings herein irrevocably elected to treat the area involved within the meander lines as "lake bed lands", it alleges that Malheur and Harney lakes "always have been and now are shallow lakes." These allegations estop the Government from claiming that anything inside the meander line constitutes, dry lands, islands, promontories, swamp or overflowed lands.

Though in controversies between States or between a State and the United States, the Court may not be technical in its rulings as to pleadings as stated in *Rhode Island* v. *Massachusetts*, 14 Pet. 210, 257, yet this Court will consider objections on technical grounds when they affect the merits. *Virginia* v. *West Virginia*, 220 U. S. 1, 27.

The field notes and plats were offered in evidence by the plaintiff herein without qualfication or limitation. Abs. p. 244, Exh. 39-A to 39-K and Exh. 40. They are the official field notes and plats of the area involved and bear their own intrinsic proof of correctness and they were approved by the United States and no attempt has ever been made to correct these surveys. In fact they themselves constitute a corrective survey over the earlier surveys of 1877, 1879 and 1888, made under authority of the General

Land Office. Accordingly their weight and accuracy must be deemed so much greater.

A public survey can be impeached only by pleading and proof that it has been established through fraud or by gross error or mistake. The rule of practice on resurveys followed in the General Land Office is stated fully in John McClennen, 29 L. D. 514, 522. It was by virtue of this rule of law that the Department felt authorized and justified in ordering Neal to make the survey. See *Armack* case, 30 L. D. 521, pleaded in the answer. We are aware of no decisions of this Court with reference to controversies between States and the United States, modifying the well settled rule that pleading *and* proof must coincide and support each other. *Sheldon & Co.* v. *Hamburg*, P. A. G. 28 Fed. (2nd) 249, 251.

The theory upon which this case was instituted was stated by the Government in support of its motion to file the Bill of Complaint as follows:

> "The purpose of this suit is to quiet title in the United States to the *beds* of Malheur, Harney and Mud Lakes against the State of Oregon.
>
> "In 1859, when Oregon was admitted into the Union, *these lakes* and the land surround and adjacent thereto were owned by the United States including the area reserved by Executive Order in 1908 as a bird refuge and designated as the Lake Malheur Reservation.
>
> "The United States claims that *these lakes are non-navigable.* The State asserts title to *these lake beds* on the theory that the *lakes* are navigable.
>
> "The question of ownership of these lands is one which should be determined.
>
> "See Bill of Complaint, Motion and Statement, pp. 3-4."

In fact it was not until after the trial commenced that the Government began to appreciate the gravity of Ore-

gon's Second Defense, the effect of the issuance of grants without restrictions upon a correctly established meander line, and now hopes to prevent the settlement of this all important rule of law, upon which depends the title of all non-navigable Lakes in the United States, where the States have not recognized riparian ownership in upland owners to the center of such lakes.

Let us examine the averments of the bill of complaint filed by the United States herein. In paragraph I on page 5 of the complaint, the complaint alleges that the United States is seized in fee of a large tract of

> "*Lake bed land,* known as Malheur and Harney Lakes including a small strip of land constituting a connecting channel between said lakes and known as Mud Lake and the Narrows. All of said *lake bed land* is situated in the central part of what is now Harney County, Oregon."

In paragraph II the premises involved herein are again described as "lake bed lands". They are again so described in paragraph III, also in paragraph VI, page 7, line 5; also in paragraph VII, page 9, line 2; also in line 18; also in paragraph IX page 11, line 3; also in paragraph X, page 12, line 2; also in paragraph XI page 12, line 3; also in the prayer for relief, page 13, lines 2, 5 and line 16.

Paragraph VII on page 10 of the bill of complaint, the premises in dispute are described as follows:

> "Harney and Malheur Lakes *always have been* and *now are shallow lakes.*"

Throughout the complaint elsewhere the plaintiff refers to the premises involved herein as *lakes.*

It is perfectly apparent under the pleadings involved in this case and which involve all of the lands on Malheur and Mud Lakes and The Narrows below the Neal meander line of 1895 and 1896, and below the meander lines established

by other surveyors around Harney Lake, that when the Government in its complaint seeks to quiet title to what it refers to as "lake bed lands" it has *eo nomine* denominated everything inside these meander lines as *beds* of these lakes. Not only this, but by the failure of the Government to plead any facts attacking the validity of the Neal line and by the dislaimers of the government's attorneys upon the trial of this case, it is very clear that no question is presented of an alleged theory that the meander line when surveyed, ran through swamp lands as in *Niles* v. *Cedar Point Club*, 175 U. S. 300; there can be no theory that the meander line, is not approximately the mean high-water line of these lakes; there can be no effort in this case to construe these meander lines as traverse or boundary lines and not the true boundary of a lake. The government's own allegations are that they all are "lake bed lands", the beds of "shallow lakes".

The United States in its present complaint has not charged that the Neal line ran through swamp lands, that it is a traverse or boundary line, that it was erroneously established by fraud or incorrectly through gross error or any error or mistake; in fact the only allegation upon the subject at all is the following statement made after the frequent use of the words "lake-bed lands" and describing the lands as beds of "shallow lakes":—

> "That the said meander-line survey made, as aforesaid, in 1895, was carried on at different elevations and without contours, and the plaintiff is informed and verily believes and so alleges the fact to be that said meander-line survey is not now, and never has been, the boundary of Malheur or Harney Lakes, including the small strip of land hereinbefore described as a 'channel,' and known as Mud Lake and the Narrows."

This allegation is not an allegation of fact and there is not a single decision to be found anywhere so far as we are aware, nor have there ever been any instructions issued by the General Land Office for surveyors requiring meander lines to be established at the same elevation or upon contours. As a matter of fact, the universal practice and the decisions of the courts without exception all show that a meander line is run exactly contrary to this pleading. A meander line is run across points of land and depressions of water. The pleading is meaningless. It raises no issuable fact. The Government is conclusively estopped in this case to deny that everything within the Neal meander line constitutes lake bed lands.

The government's engineer testifying in this case admitted on cross-examination that the Department of the Interior had never issued any instructions requiring or directing its surveyors in establishing meander lines to use levels or to follow *contours* and the pleading in this case is without the slightest support in any judicial decision. (Abs. p. 174, l. 35.) The fact that the Government has now run levels over these lakes and finds some difference in elevation at different points on the meander line or finds that the contour lines do not exactly follow the meander line is perfectly immaterial in this case and raises no issue.

Pecore testified that water is the best contour you can get. (Abs. p. 174, l. 36.) Neal said in his field notes he established the meander line at mean high water line to the best of his knowledge and ability.

Oregon contends that the United States has irrevocably elected to treat the area involved herein as lake bed lands and the lakes as true lakes and not swamp lands, islands or promontories. This court in *Illinois Central Railway Company* v. *Chicago*, 176 U. S. 646, 660, held that the word "land" includes 'everything which the land carries including ponds, pools, non-navigable waters of every de-

scription by which such lands or any portion of them may be submerged and that "lands are not the less lands for being covered with water." See also *North Side Canal Co.* v. *Twin Falls Canal Co.*, 12 Fed. (2d) 311, 314.

The attempt of the Government in this to show an easy way out of deciding the all important questions of real property involved herein by asking this Court to hold that the Neal line was incorrectly established should be given scant curtesy.

The questions should be decided upon the merits; too many years have gone by, too much of human weal and woe are bound up in these lakes and the rest of the lakes in Oregon as well as in other states, to permit this case to be tried upon the question of the accuracy or inaccuracy of the Neal line. By the government's own deliberate pleading and election in this case, the questions involved in the cases cited involving the accuracy of government surveys and meander lines, should be brushed aside as not applicable herein and this Court should go to the bone of the contentions and settle once and forever the big questions involved. The questions are those as this Court has once said should be forever settled and not perpetually retried. This Court should announce the law, so that all who run may read and know. This Court should state the rule of law by which title to the beds of innumerable inland lakes in this country can be determined. Neither the State of Oregon nor the other States of the Union should be required to speculate when and in what manner will the United States assert title by executive ukase or Congressional fiat to the other lakes in the states. There are other lakes in Oregon which are likewise valuable as bird reserves and other purposes.

3. This Court can neither make nor correct surveys and the attempt to challenge the accuracy of the Neal line, or

adjudicate that there are stable islands or promontories within the line constitutes a collateral attack.

The United States in its brief, pp. 11-12, contends that there are numerous islands within the Neal line. We will discuss the question of the islands, so called, under our discussion of Complainant's Exception IX, infra.

It further contends that the alleged error in the meander line may be corrected, on the ground of an obvious mistake of the surveyor. It then cites certain cases and we will now proceed to analyze these cases and others, which this Court may have in mind and which the Government has not cited in its brief, to ascertain if they sustain the claim that the Court can disregard the Neal line or correct the survey or permit it to be corrected by the General Land Office.

*Lee Wilson & Co.* v. *United States,* 245 U. S. 24, the first case cited by complainant in its brief, p. 13, was the second case arising in Arkansas and affecting lands in sections 22, 26, and 27, Township 12 North, Range 9 East of the Fifth Principal Meridian surveyed in 1841, were returned as fractional. Arkansas selected the township 12, so made fractional, and patented to it under the Swamp Act so selected by it, the amount of acres shown by such surveyed area. The acreage stated conformed to the surveyed land excluding the area of the lake and Section 16 which went to the state under legislation. In 1907 the Land Department undertook an investigation and found that it had been so omitted through fraud, error or mistake of the survey, surveyed the lands and homestead entries were initiated thereon. Lee Wilson & Co. claimed under the theory of riparian ownership, to the upland; the United States and the entrymen of the new surveyed land undertook to quiet title. The area involved embraced 853.60. The parties in the case and the lower court all concurred in the facts that error had been committed in the survey.

This Court, citing *Chapman & Dewey Lumber Company* v. *St. Francis Levee District*, and *United States* v. *Chandler Dunbar Water Power Company*, 209 U. S. 447, sustained the action of the Land Department in making a survey of the land inside the meander upon the discovery of the fraud or error in the existence of the lake. This case would seem to sustain the contention that unless the Land Department causes a resurvey to be made of lands omitted by fraud or error, that the courts are powerless to interfere in the matter.

It should be observed in this case when the Government discovered the error in the original survey it did not bring a suit to quiet title first but proceedings were had in the Land Department for a re-survey and a determination by the Land Department of the question of fact whether there was an erroneous survey, and the Land Department having found that there was such a survey, ordered the new survey and the lands were surveyed and plats approved, and conveyances were granted according to the new plats, and it is based upon this condition of the record that the United States brought its suit.

It was upon this state of the record that this Court, p. 29, used the language relied on:

> "As a means of putting out of view questions which are not debatable we at once state two legal propositions which are indisputable because conclusively settled by previous decisions.
>
> "First: Where in a survey of the public domain a body of water or lake is found to exist and is meandered, the result of such meander is to exclude the area from the survey and to cause it as thus separated to become subject to the riparian rights of the respective owners abutting on the meander line in accordance with the laws of the several states. . . .

"Second. But where upon the assumption of the existence of a body of water or lake a meander line is through fraud or error mistakenly run because there is no such body of water, riparian rights do not attach because in the nature of things the condition upon which they depend does not exist and upon the discovery of the mistake *it is within the power of the Land Department* of the United States to deal with the area which was excluded from the survey, to cause it to be surveyed and to lawfully dispose of it."

This statement is particularly interesting as it was written by Mr. Chief Justice White, who wrote the dissenting opinion in the *Kean* case. An instructive comment on his opinion is given in *State* v. *Tuesburg Land Co.*, 61 Ind. App. 575, 585.

The district court in the same case made the following pertinent observations, (214 Fed. 630, 638):

"The rules of law as established by the numerous decisions of the supreme court on that subject may be epitomized as follows: If there were no mistakes made may in the survey, and a permanent body of *non-navigable water was properly meandered*, the ownership of the meandered tract is controlled by the laws of the state in which the lands are situated, and if they hold that such an owner is entitled to claim ownership to the center of the lake, the national courts will follow that rule. If, on the other hand, the surveyors were mistaken or acted fraudulently, and there was at the time of the survey a large tract of land beyond the meander lines, uncovered by permanent bodies of water (exceptionally dry seasons of course excepted) purchasers of the fractional tracts bounded by the meander lines are not entitled to the land not included in the survey; the meander lines constituting in that case, boundaries."

The court then discusses the corrective survey made by the Secretary.

The decision of the district court was affirmed by the circuit court of appeals in 227 Fed. 827.

The second case cited by complainant is *Jeems Bayou Club* v. *United States*, 260 U. S. 561. On page 564 this Court stated:

> "The defendants rely upon the rule that where lands are patented according to an official plat of survey, showing meander lines along or near the margin of a body of water, the plat is to be treated as a part of the conveyance, and the water itself constitutes the boundary. The rule is familiar, and has received the approval of this court many times. . . . But it is not absolute, as this court has also frequently decided. It will not be applied where, as here the facts conclusively show no body of water existed or exists at or near the place indicated on the plat, or where, as here, there never was, in fact, an attempt to survey the land in controversy."

This case involved a survey of one A. W. Warren made in 1839, one of the original surveys involved in the *Producers Oil Company* v. *Hanzen* case, and also the survey of Bristol of 1871. It appears from the record that portions of the lands which were omitted from the survey made by Warren were surveyed prior to 1913 under orders of the Commissioner of the General Land Office, and such resurvey plat showed land including that involved in the suit lying between Warren's traverse lines and the mean high water mark of Ferry Lake as it existed in 1812 and 1839. The Commissioner of the General Land Office in 1916 ordered a survey of the uplands which the above mentioned resurvey disclosed as existing between Warren's traverse lines and the mean high water line. The survey

was made as ordered and is represented by an official plat approved by the Commissioner of the General Land Office March 28, 1912, so it is also apparent that this case is not a collateral attack upon a survey but the General Land Office resurveyed the lands when attention was called to the fraudulent or erroneous character of the original survey.

The third case cited is *Moss* v. *Ramey*, 239 U. S. 538. As we read it, the question presented here was not suggested or passed on by the Court. This case is the only one cited by the complainant which even seems to suggest that this Court can find the existence of an island where the Land Department has not acted. Yet it cites *Scott* v. *Lattig*, 227 U. S. 229 as its authority and stating the grounds of its decision. That was a suit to quiet title to Pool Island in the Snake River in Idaho, a state which recognizes ownership of the upland owner to the beds of both navigable and non-navigable bodies of water. The suit was filed April 10, 1905 by Lattig. Scott and Green filed their answers in the same year. On June 6, 1907 Scott filed a supplemental answer, wherein he set forth the facts of a corrective survey by the Land Department, the approval of the survey, the certification of it by the Surveyor General, the acceptance by the Commissioner, the approval of the official plat, which was offered in evidence on the trial of said cause as Scott's Exhibit 4, and is found opposite page 46 of the transcript in this Court in the *Lattig* case. See also transcript, vol. 21, pp. 9-10 of case No. 86. These ultimate facts appear in this Court's opinion, p. 241. So we see that the *Lattig* case does not sustain the argument of the power to make or correct surveys except through the Land Department, nor recognize the power of this Court to adjudicate the existence of an island in a navigable or non-navigable stream until after the Land Department has acted. In the light of these facts we ask the Court to read this case and

the discussion of *Whitaker* v. *McBride* contained therein; and based upon it what effect or construction is to be placed on *Moss* v. *Ramey*. General expressions in cases are to be taken as stated by Mr. Chief Justice Marshall in *Cohens* v. *Virginia*, 5 U. S. (6 Wheat.) 264, 399-500, in connection with the facts in the particular case involved. We do not believe this Court intended to go further in the *Moss* v. *Ramey* case than indicated in the cases we are now presenting and any language seeming to suggest that it did was inadvertent and should be corrected.

We believe the case is distinguishable on the authority of *Gauthier* v. *Morrison*, 232 U. S. 452, 459, where it was said that the only question presented was:

> "that a *possessory right* acquired by settlement upon public lands confessedly left unsurveyed be protected."

The case of *Gauthier* v. *Morrison*, 232 U. S. 452, involved an area of approximately twelve hundred acres, which by the wrongful act or error of the surveyor was omitted from the survey and meandered as a lake, when it was in truth and fact, *agricultural land* susceptible of cultivation. The *complaint so alleged* and the case went up *on demurrer* which admitted the allegations of the complaint. The land being suitable for cultivation was subject to entry under the federal land law. The court held that the plaintiff had a right to have its question of possession determined by the state court.

In the *Gauthier* case this Court said, p. 459:

> "Neither are we concerned with the collateral attack upon a public survey as was the case in *Craigin* vs. *Powell*, 128 U. S. 691; *Stoneroad* vs. *Stoneroad*, 158 U. S. 240, for the plaintiff is not asking that any of the lines of the survey be rejected or altered but only that a possessory right acquired by settlement

upon public lands confessedly left unsurveyed be protected."

The Court then adds that the authority for making surveys is confided to the Land Department.

The fourth case cited by complainant in its brief, p. 14, is *Niles* v. *Cedar Point Club*, 175 U. S. 300. We know of no case that has been more misconstrued. In 1834 and 1835, one Ambrose Rice, the surveyor, did his work when the waters of Lake Erie were above their ordinary stage, and extended his lines to a place he designated as "flag marsh" and "impassable marsh and water". Between that line and the lake there were islands which were high dry lands when surveyed and meandered. There was nothing but a marsh across the entire area; a sand beach one chain in width and three feet in height separated it from Lake Erie, and on this sandy beach small trees of oak, poplar, willow and cottonwood grew.

The official *plat* itself described the area within the meander line as *a marsh*. The question of the correctness of the survey having been brought to the attention of the Land Department, it took steps to correct the error. In April and May, 1881 one Marston an engineer acting under instructions from the Commissioner of the General Land Office dated April 2, 1881, surveyed and subdivided into sections and parts of sections the area between the meander line of Rice and Lake Erie. This survey was approved and subsequently lands created thereby were patented, and Cedar Point Club acquired title by means conveyances from the patentees. Its title was challenged by the appellant Niles who claimed the original meander line was correct and asserted title between it and the lake. This Court sustained the corrective survey and the title of the appellee under the patents issued on the Marston survey. Accordingly here too we have no attempt to challenge a

survey as in the case at bar. It was not a collateral attack.

The fifth case cited by complainant in its brief is *French-Glenn Live Stock Co.* v. *Springer.* It is particularly important as it arose on Malheur Lake, involving lands situated just below the Meldrum 1877 line. When the case was tried the Neal line had been run, so we again do not have a collateral attack on a survey. But there are facts more interesting still and we proceed to analyze this case under the record as filed in this Court.

Argument was made before the Master and may be made before this Court of the fact that the accuracy of the Meldrum line of 1877 in sections 34 and 35, Tp. 26 S., R. 31 E., W. M. South of Malheur Lake, was put in issue in said case of *French-Glenn Live Stock Co.* v. *Springer,* and decided by a jury in the Circuit Court of Harney County, then appealed to the Supreme Court of Oregon and then taken by writ of error to this Court. 185 U. S. 312. Extensive excerpts from this case were introduced in evidence herein. Abs. p. 139-142, 145-173. Dfts. Exh. 4; Plff's Exh. 61.

It is highly interesting to note how the Supreme Court of Oregon and this Court treated the verdict of the jury. It appeared that the case was commenced Nov. 27, 1896. (Abs. p. 147, l. 38.) It was tried before a jury March 29, 1897. (Id. p. 153, l. 37.) The complaint is an ordinary complaint in ejectment and involved an unsurveyed area below the Meldrum line upon which Springer squatted in 1888. (Id. p. 148.) The answer of Springer filed in said cause, among other things, *pleaded that a new meander line* of 1895 (that of J. H. Neal) had been run. He challenge the accuracy of both lines, but obviously that of J. H. Neal was not in issue and his claim did not abut upon it. He claimed there were dry lands below the Meldrum 1877 line, which constituted such at the time of the survey and not constituting accretions to the upland. He said the

surveys were run a mile from the lake. (Id. p. 151.) The reply denied that a new meander line was run through the country in 1895 "varying materially or otherwise in much of its course from that run in 1877" and then the plaintiff pleaded the accuracy of the 1877 line. (Id. p. 152-3.)

Accordingly we have here clearly before the court and jury, and undoubtedly stressed in argument, the fact that the United States had run a new meander line in 1895 a mile or so northerly of the Meldrum line. Hence this case was not a collateral on the Meldrum line. Is it to be wondered that the jury held in favor of Springer in face of the fact that the official Neal line was run in 1895 a mile below the Meldrum line and that the lands Springer claimed were between the two lines, lands which the Government surveyed into governmental lots and subdivisions in the usual manner and patented to Springer subsequently. Springer's was a test case for a number of settlers. Here was a fact sufficient alone to win this lawsuit for the settlers. But there is another feature of this case more significant still, which renders exceedingly naive the statement of the Supreme Court of Oregon and of this Court, as to what the jury decided. The Supreme Court of Oregon stated several of the contentions made by Springer but disregarded all but one. This contention was stated as follows:

> "The other is that there never existed a lake in front of or bordering upon the plaintiff's lots." (Abs. p. 164, l. 29-30.)

The court then points out how this issue was left to the jury and said:

> "The issues of fact were clear and distinct, and, having been submitted to the jury, there is no reason why their verdict should not preclude the plaintiff,

as in other cases where a jury has passed upon a submitted question of fact." (*Id.* p. 166, l. 3-6.)

The court concludes:

"The pivotal question before the jury, as we have seen, was whether a lake existed in front of these lots," etc. (*Id.* p. 167, l. 4.)

This Court on writ of error affirmed the opinion of the Supreme Court of Oregon, and also accepted the verdict of the jury as conclusive. 185 U. S. at p. 54.

How little did both courts understand what the jury really decided the case on. Both courts indulged in presumptions. We know in the case at bar that the waters of Malheur Lake did flood the Meldrum line, even at the place in controversy. (Abs. p. 139-145.) The cutting of the Sand Reef in 1881 did lower the waters as the evidence conclusively shows and as the Land Department held in the *Armack* case, 30 L. D. 521. The Supreme Court of Oregon and this Court said that the jury found there was no lake in front of Meldrum line where Springer squatted but only one to the "*northeast* of the lots of plaintiff" (Abs. p. 165, l. 40), yet the jury in the case of *Cawfield* v. *Smyth*, 69 Or. 41, found there was a lake in front of Cawlfield's lands which lands were to the *northwest* of the Springer lands. See also report of the Special Master, p. 27. Here are two verdicts of juries on Malheur Lake, and arriving at opposite conclusions on the same question of fact. Are these cases of any evidentiary value?

What the Supreme Court of Oregon and this Court did not know when they wrote the opinions, and what they could not know, but what we now know from the evidence in this case, is that the trial jury in the *Springer* case brushed aside all the fine spun theories presented by the trial court's elaborate instructions (and many of which instructions are palpably erroneous but were not reserved

for review (Abs. p. 154-160), and decided the case of *French-Glenn Live Stock* v. *Springer,* not on the question of whether there was a lake in front of the Meldrum line, but on the question of what was morally right and wrong between man and man and found that Springer was entitled to prevail upon the defense of *estoppel* pleaded in the case. That this is the true interpretation of the jury's verdict is *indisputable.*

The answer of Springer pleaded the defense of estoppel in paragraph VII of his answer. (Abs. p. 150-151.) The defense was put in issue by the reply. (Id. p. 152, l. 19-45.) Springer introduced evidence in support of his defense of estoppel. Counsel in the case at bar stipulated that this Court may have recourse to the records and briefs on file in the *Springer* case. (Abs. p. 145, l. 18-37.) An examination of pages 17, 18 -19 of the Transcript of Record in the *Springer* case on file with the clerk of this Court shows that Springer testified that he had hauled some lumber and placed it west of the Sod house (which is south of the Meldrum line) intending to build there; that he met Peter French, president of the French Glenn Live Stock Company, who told him that the lumber was on his land and he said:

> "if I would move over north of the meander line that he didn't claim that and that it was alright but that land where this lumber was he claimed was his."

He then testified that relying on what French had said that he did not claim the land north of the Meldum line, he moved upon that land and built his house there and lived there. See Transcript p. 25 et seq.

Here then we have a perfect plea of estoppel and ample evidence supporting it, all introduced before the jury on the trial of that case. The trial court instructed on the subject. (Abs. p. 159, l. 1-9.) Now then what did the jury

decide and what did it pass upon? *Presumably* on all the issues; *in fact* Springer won on his defense of estoppel, as we will now show.

Thirty-four years after the *Springer* case was decided by the jury, the present lawsuit was heard before the Special Master. The Government herein called as a witness one Robert Irving, 74 years old. On cross examination facts were sought to be elicited as to the *Armack* case pleaded in the amended answer, but he had none, but incidentally disclosed that he was one of the jurors who rendered the verdict in the *French Glenn* v. *Springer* case, and the remarkable thing about it is that this juror told how the trial jury decided the case on the defense of estoppel, finding the facts as pleaded by Springer in his answer and testified to by him. (Abs. p. 142-144.) His testimony constitutes a perfect picture of that trial and a remarkable recollection after 34 years of what was testified to in the case and what the jury decided. We ask the court to read this testimony. Here then we have the real truth of the matter, indisputably so and beyond cavil; the facts speak cogently. They make the opinion of the Supreme Court of Oregon and of this Court, wherein both courts hold that the jury decided there was no lake at all north of the Meldrum line appear frivolous and without foundation to support it, as well as this Court's statement in reference thereto in the *Whitaker* v. *McBride* case, 197 U. S. 514, and if this Court has any impression after reading the testimony herein that the *Springer* case tends to show that there was not a lake except to the northeast of the Springer claim, such impression should be dismissed. We call attention to the remarks of Mr. Justice Dawson quoted on page 137 of our opening brief.

The *Springer* case on an analysis of its facts, shows that it will not support a contention that the United States may herein collaterally attack a survey, and removes the case

from any evidentiary value herein as to where the true meander line of Malheur Lake, namely the water's edge, actually was.

The case of *Security Land & Exploration Co.* v. *Burns*, relied on by complainant in its brief, should be considered in connection with the prior case of *Kirwin* v. *Murphy*, 189 U. S. 35, 52, 53, 54, 57, which was a case wherein Murphy and others filed a complaint to enjoin the United States Surveyor General for the District of Minnesota from surveying by the direction of the Commissioner of the General Land Office certain lands claimed by the Land Department to be unsurveyed public lands of the United States.

It appeared that in 1876 one Howe, a Government surveyor, had a contract for the survey of all lands in township 57 north of range 17 west in St. Louis County, Minnesota and that he made and filed field notes of a survey in said township from which an official plat was made, and approved by the Surveyor General of the United States for the District of Minnesota and the Commissioner of the General Land Office. There was no evidence or any marks on the ground to indicate that any actual survey of said township was ever made by Howe as required by his contract and the rules and regulations of the General Land Office beyond the running and the due marking of the exterior boundary line of said township where the section quarter and other posts and markings established by him are and always have been clear, distinct and readily found and traced. The defendants alleged that the field notes were false, fraudulent and the plat made therefrom was false and incorrect. It appeared that about twelve hundred acres was still unsurveyed lying between a lake known as Cedar Lake and lot described in survey made by Howe. There was no evidence upon the ground that any meander lines of Cedar Lake was ever surveyed by Howe or any meander posts placed by him about said lake except one

where the north line of the township encounters the lake. The outlet of the lake is at a different place from that described in the field notes and shown upon the plat. Instead of the shores of the lake being low and swampy as stated in the field notes, the banks are generally high and sloping, lands suitable for agriculture extending around the lake and support a good growth of pine and other forest trees large enough for lumbering such as will not grow in water and this was the condition in 1876. Proceedings were instituted in the Land Office for the making of a resurvey and the injunction was brought to restrain the surveyor-general from making such re-survey.

This Court said, page 52:

> "In this case no survey was in fact made, no meander line was in fact run and no body of water in fact existed near the false meander line indicated. A line purporting to delimit the lake was from one mile to a quarter of a mile from the lake and ran over high agricultural land covered with ancient trees which could not have grown in water."

This Court held that the Land Department could not be stayed in the discharge of a duty not ministerial but involving exercise of judgment and discretion upon the ground that its jurisdiction had been lost by estoppel.

The Court held, (p. 54):

> "The administration of the public lands is vested in the Land Department and its power in that regard cannot be divested by the fraudulent action of a subordinate officer outside of his authority and in violation of the statute. . . . The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government and the Land Department charged with the duty of surveying the public domain must primarily deter-

mine what are public lands subject to survey and disposal under the public land laws. Possessed of the power in general its exercise of jurisdiction cannot be questioned by the court before it has taken final action."

The Court held that after the land offices shall have disposed of the question if any legal right of plaintiff has been invaded he may seek redress in the Court. And if the land department issues patents to persons not entitled thereto under the facts, the Court can then in the appropriate proceding determine who has the better title or right. The complaint in the case of *Kirwin* v. *Murphy* was dismissed.

The complaint shown on page 3 of the transcript in the *Kirwin* case, and of the answer, transcript p. 4, 37 shows that the plaintiff alleged and the answer admitted there was a fraudulent survey.

The facts in that case are entirely different from the facts in the case at bar.

Mr. Pecore and his associate surveyors found practically all of the meander corners established by Neal, and there is no condition of the lake at or near the meander lines that compares in the slightest manner whatsoever with the facts in the case *of Kirwan* v. *Murphy*.

The sixth case cited by complainant in its brief, p. 14 is *Security Land & Exploration Co.* v. *Burns*, 193 U. S. 167. It related to the same survey involved in the *Kirwin* case.

At the trial of the case there was offered in evidence as Exhibit 1, proceedings before the Secretary of the Interior of the United States, dated January 19, 1895, with reference to re-surveys. Transcript of record, page 18. Also a copy of the order of the Commissioner of the General Land Office, dated October 31, 1895, addressed to the United States Surveyor General, directing him to make a contract for the survey of the land. A copy of the instrument was

offered in the case and marked Exhibit 2. Transcript of record, page 18. Exhibit 1 is set forth on page 49 of the transcript of record and exhibit 2 on page 53 of the transcript of record. Exhibit 1 is the decision of the Secretary of the Interior Hoke Smith, dated January 18, 1895, in the matter *In re G. A. Burns, et al,* re-survey and registered with the Commissioner of the General Land Office. It states as follows:

> "The showing made here is amply sufficient in my judgment to justify the belief that the survey by Howe was a palpable fraud upon the government; that there was no attempt made to make the meander line conform to the shore line; and that the government land does and did exist at the time the survey was made, reported and approved."

The Secretary held that the doctrine of riparian rights was not involved and ordered a hearing to determine the facts, whether there was fraud in the survey and whether indications could be found upon the ground showing whether there was any survey. Exhibit 2 referred to, page 53 of the transcript of record, is a letter directed to the Commissioner of the General Land Office to the United States Surveyor General at St. Paul, Minnesota, dated October 31, 1895, referring to the fact that a hearing was had on October 23, and this letter states:

> "After a full presentation of views by the attorney for the contestants, I concluded that a survey should be made of the public lands lying between the pretended old meander line of 1876 and the shore line of Cedar Island Lake in Township 57 North, Range 17 West, Fourth Principal Meridian, State of Minnesota. Therefore you will enter into a contract with a surveyor of integrity and ability to survey the public land designated above and the expense of said survey

> will be chargeable to the appropriation for surveys of public lands for the current fiscal year.

The letter of instructions then sets forth how the meander line should be run and the survey made.

It is accordingly clear from the foregoing case that there was a fraudulent survey and in fact *no meander line was ever run;* that the matter was brought to the attention of the Department of the Interior and the United States Government exercised its prerogative to survey through said Department unsurveyed lands, and those matters were all in issue and therefore the *Exploration* case affords no authority contrary to the position of the defendant in the case at bar. It was not an attempted collateral attack on a survey. This Court held under the facts in the case that there was a fraudulent survey. The facts showed the existence of high upland between the lot and the lake which was more than half a mile away. See discussion of this case on pages 180 and 183 of the official reports. Among other things, this Court said:

> "The surveyor never was on the ground and never saw the lake he pretended to measure and the lake never existed where he laid it down in his fraudulent survey."

The seventh case cited by complainant in its brief, p. 14, is *Chapman & Dewey Lumber Co.* v. *St. Francis Levee Dist.*, 232 U. S. 186. This case presents no facts pertinent to this case. See p. 197. It also appears that the Land Department made a corrective survey. See p. 189. Also 37 L. D. 345, 462.

*Little* v. *Williams*, 231 U. S. 335 is a similar case in Arkansas, and the case went off largely upon the construction of a stipulation of counsel. P. 339. The meander line had been run along a slash or slough, instead of the lake which was a mile beyond with well defined banks.

A case illustrating the same rule which we cite, though not cited by the complainant herein, but which this Court may have in mind is *Producers Oil Co.* v. *Hanzen,* 238 U. S. 325, and it contains some very pertinent remarks on meander lines and surveys. This case also arose on Jeems Bayou, as did 260 U. S. 561, *supra.* It was admitted by both parties that the land in controversy was high land at the date that Bristol made his survey in 1871. (Transcript of record filed with this Court, in said case, page 39.) Exhibit No. 2 introduced in said case was a certified copy of the official Government map of the Bristol 1871 survey. He refers therein to the "Table of Traverse." The United States Land Office in platting the Bristol survey did not make or in any way treat the so-called meander line of Bristol as such, and upon said Exhibit No. 2 it is apparent that the traverse line marked upon the map is some distance outside of the bay, and it is apparent that it is not one of the sinuosities of the bay. It is apparent that the map was drawn for the purpose of surveying off a total acreage of 123.88 acres without respect to the real shore line as it followed neither its sinuosities nor near thereto. The *plat itself* showed a large area of land between the traverse lines and the water's edge, which the United States had a right to survey. Furthermore the case was a mere possessory action.

The Land Department's refusal to accept the Bristol survey and the making of the new survey by it was sustained by this Court, for the reason that the Bristol survey did not comply with the specifications laid down in the leading case of *Railroad Co.* v. *Schurmeier,* 7 Wall. 272, in that: (1) the Bristol survey was run not for the purpose of showing the approximate location of the water's edge and affording a reliable means of ascertaining the quantity of land in the fraction subject to sale and to be disposed of, but for the purpose of surveying off a specific tract for a

particular applicant for public lands, (2), it did not follow the sinuosities of the shore, (3) it was not located near such shore, and (4), the *plat itself* showed a large quantity of land lying between the survey line and the waters edge. Accordingly the survey lines were held to be *traverse* or *boundary* lines, in other words an exception to the rule which makes the water's edge the true boundary or meander line instead of the meander line itself. This is the contention which the Complainant is making in its point (1) on page 16 of its brief. It is perfectly obvious that there is no similarity in the line run by Neal and involved herein and that involved in the *Jeems Bayou* or the *Hanzen* cases, *supra*.

In the case of *Horne* v. *Smith*, 159 U. S. 40, the fractional sections purported to abut upon a river, the river being shown as being on the west side thereof. The evidence showed that as a matter of fact, the lots *bordered upon a bayou*, and between it and the main waters of the river was a body of land involved therein, sections 23 and 26 according to the plat, were fractional sections bordering on Indian River extending in width a *distance of a mile* or a mile and a quarter and amounting to some six hundred acres. This was a body of low land, but in some places, however, it was from four to six feet above the level of the river and covered with a growth of live oak trees, many of them three and four feet in diameter and it was not land formed by accretion since the survey. The Court held that the waters of the bayou were the water boundary intended, and the land between it and the main river was unsurveyed.

The latest series of cases by this Court are *United States* v. *Lane*, 260 U. S. 662, and three associated cases. In one of the cases a tract 4000 feet long and with a maximum width of 1200 feet separated the meander line from the water's edge. But the Court applied the well settled rule and not the exception thereto and held the water and not the

meander line was the true meander line and boundary of the title of the upland owner. The Court called attention to the fact that there were no circumstances to suggest fraud, and said:

> "At the time of his survey the lands were of such little value the locality was so wild and remote and the attendant difficulties so great that the expenditure of energy and money necessary to run the lines with minute regard to the sinuosities of the lake would have been out of all proportion to the gain." p. 665.

And again:

> "Considering the circumstances in respect of the character and value of the lands, the wildness and remoteness of the region, and the difficulties surrounding the work of the surveyors, the failure to run the lines with more particularity was not unreasonable, and we are constrained to agree with the lower court in holding that the *waters of the lake* and *not the traverse line,* constitute the boundary." p. 667.

The Land Department applied the reasoning of this case subsequently in *Etoile P. Hatcher* and *W. M. Palmer,* 49 L. D. 453, 459. See also *John McClennen,* 29 L. D. 514-520.

In the *Lane* case this Court quoted with approval the statement made by this Court in *Mitchell* v. *Smale,* which is set forth on pages 110-111 of our opening brief.

The rule we contend for is further exemplified in *Lane, Franklin K.* v. *Darlington,* 249 U. S. 331.

It must be remembered that a survey is designed for the purpose of the division of the high lands from the low lands with approximate and reasonable accuracy, and as stated by Mr. Justice Miller in *United States* v. *Vallejo,* 68 U. S. (1 Wall.) 658, 660:

> "In this class of cases a large discretion must necessarily be left to the surveyor and it is not appropriate to consider whether the survey was accompanied with the nicest discrimination or the highest wisdom."

There is nothing in the cases cited by complainant justifying the contention that the alleged "error in the meander line may be corrected" herein as stated in its brief, p. 13. The facts of the cases cited negative any such assumption. This Court has spoken in no uncertain terms on this subject in other cases.

Oregon contends that the United States cannot claim herein that the Neal line was incorrectly run, or that there are any stable lands or islands inside the Neal line for the making of the survey and its approval by the General Land Office constitutes a conclusive determination that the line is correct and the areas within the meander lines constitute the beds of permanent or apparently permanent bodies of water styled lakes; that the character of these lands was a matter committed to the Land Office by Act of Congress, its action thereon is final and unimpeached, that this Court does not make nor correct surveys, it can only act in a direct attack after the Land Office has passed on the question, and to assert or contend herein that there are swamp lands or any stable lands or islands within the meander line boundary involved, or that the meander line should have been run elsewhere, constitutes a collateral attack on the action of the General Land Office and will not be permitted herein; that the Government has made its election herein in the form of the remedy sought and the United States is forever hereafter estopped in the Land Department or elsewhere from challenging the Neal meander line or from denying that everything within such meander line constitutes lake bed lands, and cannot deny that the waters are the waters of lakes, navigable or non-navigable, according

to the view that this Court ultimately takes of the facts herein. This, we assert, is the conclusion to be drawn from the following decisions by this Court and other courts:

*Craigin* v. *Powell*, 128 U. S. 619, 697-698.
*Stoneroad* v. *Stoneroad*, 158 U. S. 251.
*Russell* v. *Maxwell Land Grant Co.*, 158 U. S. 253, 256.
*Heath* v. *Wallace*, 138 U. S. 573, 585.
*Knight* v. *United States Land Assn.*, 142 U. S. 161.
*Bishop* v. *Nesqually* v. *Gibbon*, 158 U. S. 155, 166.
*United States* v. *Morrison*, 240 U. S. 192, 210.
*United States* v. *State Investment Co.*, 264 U. S. 206, 212.
*Murphy* v. *Tanner*, 175 Fed. 537, 542.
*Green* v. *United States*, 274 Fed. 145, 151.
*Work* v. *Beechland Development Co.*, 19 F. (2d) 699, 701.

Though other attorneys of the Government cannot bind it by declarations it may be interesting for the Court to see the former views of the Attorney General of the United States as expressed in his briefs in *Lane* v. *Darlington*, 249 U. S. 331. See pp. 13, 15 and 16 of Franklin K. Lane, appellant's brief.

As stated by the Special Master, report, p. 10, the United States has issued grants and patents to approximately 79.80% of the uplands bordering the Neal meander line on Malheur Lake. That very fact makes it impossible for any court to pronounce the Neal line as incorrectly run without bringing in the riparian owners and giving them a chance to be heard. For some unaccountable reason, unless it be to freeze out the riparian owners by separate private trials in the district court, which they can illy afford, the Government has refused to cooperate with the State in giving these persons an opportunity to be heard. The very suggestion of the plaintiff in this case that the Neal line is not correct, and the attempt to invalidate it herein, as the brief

of plaintiff asks this Court to do, emphasizes the fact that the riparian owners and settlers are necessary and indispensable parties and should be brought in as this Court required them to be brought in in *Oklahoma* v. *Texas*, and to assure its jurisdiction appointed a receiver of the property involved. The situation is even more apparent on the Narrows and Mud Lake where the plaintiff has no lands at all on the Meander line.

## COMPLAINANT'S EXCEPTION III.

What has been said in our discussion of Complainant's Exception II answers substantially all the points raised in its Exception III.

There is nothing in the evidence to indicate that the Neal line is a traverse line, complainant's point (1), as was the Bristol line involved in *Producers Oil Co.* v. *Hanzen*, 238 U. S. 325. There is nothing in the field notes or the plat to even suggest that the waters of Malheur Lake, the Narrows, Mud Lake and the waters of the Sand Reef Division, do not constitute the true meander line. The meander line is run at mean high water mark and the *plat shows* the *waters of the lake* at the meander line.

The complainant admits in its point (2) that Neal attempted to "approximate the mean high water flood lines thereof", though what it means by the word "flood" is not clear. All high water indicates a flood condition in stream or lake, normal or unusual as the case may be. We have discussed the question of the so-called islands on pp. 65-78 of our opening brief, and advert to the matter, *infra*.

As to complainant's point (3), the evidence shows that except in 1888 and 1889 and in the dry cycle of recent years, which commenced with some variations in 1915, the waters of the lakes in earlier days stood between elevations 4097

and 4105. The precipitation for the period 1915 to 1920 was low and also below normal since 1927. Jessup Report, Exh. 52, p. 15. See also the carefully prepared water study of the Special Master set forth in his report, volume 2, pp. 89-94, where will be found in the form of a table a succinct statement of the evidence of the witnesses, the tree ring study according to the graf in the Jessup Report, Exh. 52, fig. 9, the precipitation records and the run off records so far as they have been kept. An analysis of the testimony of the witnesses as to hay cut, will show that they are frequently testifying to conditions on the deeded lands above the lake, and frequently as to the area between the two meander lines; and in spite of the exaggerated testimony of a few interested witnesses the overwhelming weight of the testimony is that the areas inside of the lake were covered with water in the spring time in later years and sometimes all the year long, and practically all of the time in the earlier days when there was a lot more water. The crossings in the lake were only in the fall or winter or in the dry years of 1888, 1889, 1918, 1919, and in the recent dry period. As the naturalist Dr. L. E. Hibbard, who for a number of years acted as conservator for the Government of the Reservation stated, no hay had been cut below the Neal line prior to 1899 and the water before that was pretty high. Abs. p. 579, l. 40. We call attention to Mr. Neal's remarks contained in his description of the so-called knolls, infra.

Complainant's points (4) and (5) are a striking illustration of error in mathematics. Though it is true that the annual rain fall in Harney Valley is from 8.6 to 10 inches and there is an annual evaporation of 40 inches, this does not tell the story. According to these figures if it rains 10 inches a year and evaporates 40 inches a year, it is clear that at no time could there ever have been any such thing as Malheur, Mud or Harney Lakes with elevations either at

4093 or the higher limits from 4095 to 4098, as found by Government surveyors Meldrum, Perkins and Moore in 1875, 1877, 1879 and 4095 in 1888 as found by J. H. Neal. See Abs. p. 139, l. 1-11; Report, Appendix 3, plate opposite p. 4. We have shown in our opening brief by the testimony of eye witnesses stages of water varying from 4095 to 4105 in different years.

A rainfall of 10 inches with an evaporation of 40 inches would have meant a little pond in Malheur and the other lakes of 10 inches for a few days or weeks in the spring. On plaintiff's figures there never was or could have been a swamp. Where then is the vast lake which a Government report shows extends to the base of Saddle Butte Mountain shown on plaintiff's exhibit 3, and which lake attained an elevation of 4097 as shown by the contour maps on said exhibit? Where is the lake "so broad that its farther shore can not be discerned from the summit" of Saddle Butte Mountain, (Jessup Report, Exh. 52, p. 39)? Where is the body of water that looked like a vast inland sea which Fitzgerald saw from King Bolt Hill, (Abs. p. 394, l. 28)? Where is the lake which when a witness was out in the center of it in a boat was so large the edges were hardly discernable? (Abs. p. 561, l. 18.) What of the uncontradicted descriptions of this large lake shown by the witnesses listed under Defendant's Exceptions 17, 18, subd. (a), and 25?

This case has degenerated on the part of the Government into *an effort to win a lawsuit* on the accuracy of the Neal line and to evade the big real property questions involved herein. One of the reasons for the shallowness of the lakes in the recent days is that there has been less precipitation in Harney Valley, and the first run off from the low hills has been absent largely since 1915. The loss to Malheur Lake is between 40,000 and 50,000 acre feet yearly, at least, due to irrigation, according to hydraulic engineer Jessup. Plff's Exh. 52, p. 76. This is sufficient alone to lower the

lake one foot, it having an area within the meander line of 47,670 acres.

Leroy Bunyard, was one of the witnesses who tried to make the western part of the lake as dry as he could, which his evidence clearly discloses. He said when the water was high it was probably a foot or twenty inches above the roots of the tules and in the fall practically on a level. (Abs. p. 509, l. 43 et seq.) He was asked how much was the vertical rise and fall of the water and he said the fall was a foot during the evaporating portion of the season from the high water mark in the spring. (Abs. p. 510, l. 11-16.) He went into that country in 1893.

This testimony conclusively establishes that though there was a rainfall up to 10 inches normally in the Harney Valley, and an evaporation of 40 inches, that a large inflow not explained by precipitation in the valley came from the high Blue and Steens Mountains.

What Government counsel have ignored in the mathematical presentation, pp. 16-17, (4), (5) of their brief, is that the big supply of these lakes always has been the Blue Mountains to the north of Harney Valley and the Steens Mountains to the south; these mountains are shown on appendix 15, the plate opposite p. 24 of the Report of the Master; these mountains feed Silver Creek which flows into Harney Lake and the Silvies and Blitzen which flow into Malheur Lake with their various tributaries. The evidence shows that in recent years, there has also been a lack of heavy falls of snow in these mountains, and that is why we had a dry lake in 1931 and 1932 or substantially so. Records were not kept of the precipitation on these mountains in the form of rain and snow, and only incomplete run off records are available. Report, vol. 2, p. 93; Jessup Report, Exh. 52, pp. 70-79.

There are no records of the flow in the channel under the bridge at the Narrows, except for the year 1922 (Exh. 53,

p. 190). The record is slightly fuller with reference to the flow past the gage below Mud Lake, and of course that which flowed out of Mud Lake flowed through the Narrows. Mud Lake records are for the years 1916-1918, 1921 and 1922. (Exh. 52, p. 185-8.) In the Master's report, vol. 2, pp. 91-92 is a brief resume of the testimony on water conditions by years. It is apparent therefrom that from the year 1915 on, the period was generally very unfavorable except for two short periods, upon which to base water studies. But by the end of September, 1917, the run off from Mud Lake was 27,900 acre feet, which looks like a fairly good record for one of eastern Oregon's dry years, including the evaporation period. In 1918 another dry year, the total run off is given as 20,000 acre feet. For 1921 it was 18,300 acre feet. For 1922 it was given for three months as 5,240. Yet we know from the testimony of Attorney Staley, Government counsel in the proceedings herein before the Special Master and Geo. Benson, the Government warden, that that was the year the water came to the Neal line. See Oregon's opening brief, p. 82. And that was the year when a party of state and Government men including the writer of this brief were out on the lake trying to work out a basis of settlement of this controversy, when the water came to Liljeqvist's nose, a depth of five and one-half feet as this record shows, namely 5½ feet above elevation 4089 plus or 4094.5 plus. Now with this amount of water flowing out of Malheur Lake, through the Narrows and Mud Lake, it is apparent that with an evaporation of 40 inches, a large quantity of water was flowing into the lakes.

Mr. Jessup concludes that not more than forty or fifty thousand acre feet per year is lost by irrigation. (Exhibit 52, p. 76.) And in that estimate he is figuring that loss to the lake, including all diversions and irrigation on the Silvies, on the Blitzen, on Nine Mile, and the various other streams flowing into Malheur Lake, referred to in

the testimony. According to his table No. 19 in exhibit 52, p. 71, from which this estimate of 112,000 acre feet is set forth. Comparison of table No. 19 on page 71 of plaintiff's exhibit 52 with pages 100 to 124, inclusive, of plaintiff's exhibit 53, gives the following comparative run-offs in the two tables, the first figure being from table No. 19 and the second figure from said pages 100 to 124 of exhibit No. 53; to-wit stream year 1903-1904, 200,000 acre feet as against 299,000 acre feet; stream year 1904-1905, 5,000 acre feet as against 75,400 acre feet; stream year 1905-1906, 61,000 acre feet as against 140,000 acre feet; stream year 1907-1908, 10,000 acre feet and unrecorded in exhibit 53, (see page 102, 103) and also unrecorded for the years 1906-1907 where exhibit 52 gives 70,000 acre feet; 1908-1909, 15,000 acre feet as against 93,900 acre feet; stream year 1909-1910, 72,000 acre feet as against 152,000 acre feet; stream year 1910-1911, no acre feet as against 71,900 acre feet; stream year 1911-1912, 90,000 acre feet as against 173,000 acre feet; stream year 1912-1913, 40,000 acre feet as against 96,480 acre feet; stream year 1913-1914, 64,000 acre feet as against 153,000 acre feet; stream year 1914-1915, no acre feet as against 39,900 acre feet; stream year 1915-1916, 138,000 acre feet as against 192,000 acre feet; stream year 1916-1917, 105,000 acre feet as against 173,000 acre feet; stream year 1917-1918, 10,000 acre feet as against 42,100 acre feet; stream year 1918-1919, 29,000 acre feet as against 114,000 acre feet; stream year 1919-1920, 10,000 acre feet as against 80,600 acre feet; stream year 1920-1921, 160,000 acre feet as against 236,000 acre feet; stream year 1921-1922, 50,000 acre feet as against 118,000 acre feet; stream year 1922-1923, 10,000 acre feet as against 81,200 acre feet; stream year 1923-1924, no acre feet as against 35,700 acre feet; stream year 1924-1925, 42,000 acre feet as against 120,000; stream year 1925-1926, no acre feet as against 49,800 acre feet; stream year 1926-1927, 52,000 acre feet as

against 132,000 acre feet; stream year 1927-1928, 47,000 acre feet as against 126,000 acre feet; stream year 1928-1929, no acre feet as against 54,200 acre feet; stream year 1929-1930, no acre feet as against 21,800 acre feet. Thus it appears from a comparison of table No. 19 on page 71 of exhibit 52 and the tables shown on pages 100 to 124, inclusive of Exhibit 53, that invariably there is a great quantity of water shown in Exhibit 53 which does not appear to be accounted for in table No. 19. On said pages 100 to 124, inclusive, there are approximately 2,859,980 acre feet accounted for in 25 years from the Silvies River alone, or an average of 114,399, acre feet per year; yet on table No. 19 on page 71 of Exhibit 53, Mr. Jessup only gives 112,000 acre feet as reaching Malheur Lake, including not only the Silvies River, above mentioned, but the Blitzen and the run-off from the foothills. Surely estimates and theories are dangerous things. The 112,000 acre feet stated on page 71 of exhibit 52 gives credit for only 23 years, and it is apparent that if we commence with the year 1903, no credit is taken for some years.

The tables given in plaintiff's Exhibit 53 on pages 13 to 24 inclusive, with reference to the monthly discharge in acre feet of the Donner and Blitzen near Diamond, Oregon for a period of 13 years gives a total of 1,198,440 acre feet, or approximately 92,187 acre feet per year as an average. The record of the Blitzen and of the Silvies above stated, and they are only partial records, (See Exhibit 53, pp. 107-112, 115, 116; 16, 19), show a run-off of more than 206,000 acre feet per year, mean. What has become of the rest of the water we are given credit for in table No. 19? Has it been used up in irrigation in the sagebrush lands up above, and therefore not arriving at Malheur Lake?

From an inspection of figure No. 1 contained in exhibit No. 52, it would seem that the record is still more inaccurate with reference to the water coming down Poison Creek,

Cow Creek, Nine Mile Slough, Malheur Slough and the large foothill area. If there was only 112,000 acre feet of water coming into Malheur Lake, which has an area of 47,850 acres inside the Neal meander line, and if the evaporation of the lake is 40 in. per year, it is apparent that Malheur Lake would have gone dry long before the white men ever came into Harney County, and there would never have been a boat on the lake or any water therein in the history of the white man.

With reference to the shrinkage of peat, referred to by Mr. Jessup on page 80 of exhibit 52, we would suggest to the Court that as it is apparent that vast quantities of grain were sown in the bed of Malheur Lake in the season of 1931, the driest year in the history of the lake, and the fact, which the Court will take judicial knowledge of, that moisture is required for the growth of grain, it must be quite apparent that this peat soil had not dried out to such an extent as to justify an inference of shrinkage such as set forth in the report, and in reference to this matter, we call the Court's attention to the comments of Mr. Cooper and Mr. Dodge on page 1088 of the abstract of record with reference to this particular theory of the alleged shrinkage of the peat last summer when plaintiff's exhibit 3 was made. Defendant's exhibit X-6 was made in 1914, long before the present controversy started, and the actual measurements of Cooper and Dodge were reduced to this map, and also recorded, and the elevation of the water was 4,094.6, or if we take .3 therefrom to reduce it to U. S. datum in this case, the elevation of the water was 4,094.3. Cooper and Dodge have called attention to the fact that their measurements, as shown upon the map made in 1914, give elevations which coincide exactly with plaintiff's Exhibit 3. (Abs. 1089.) We would suggest in view of the actual survey made and the records kept of it, that the shrinkage of the peat in the year 1931 when Pecore and his corps of engineers made plaintiff's Exhibit 3, is negligible.

## COMPLAINANT'S EXCEPTION IV.

This exception presents complainant's contention that everything below the Neal line on Malheur Lake, the Narrows, Mud Lake and the Sand Reef division, the mean elevation of the Neal line being 4093, is not *lake bed*, but *swamp and overflowed land*. It would seem that this contention would necessarily result in admitting that these lands belong to the State of Oregon and should be surveyed and conveyed to it under the provisions of the Swamp Land Act of September 28, 1850, as extended to Oregon by the Act of March 12, 1860, 12 Stat. 3. See *United States* v. *Minnesota*, 270 U. S. 181, 202. The act was a grant *in praesenti* and relates back to a date prior to the Executive Order of August 18, 1908. Even the so-called islands, if the waters in the lake were conceded to be as low as plaintiff tries to establish, are swamp and overflowed lands under the elaborate presentation of attempted proof by it of their use from earliest times for the cutting of wild swamp grasses and tules. Under no possible conception of the proof could the islands so called be considered as lands above the lake waters. If there is one fact conclusively established in this case by the Government it is, that when Malheur Lake rose in ordinary spring seasons, all of the islands substantially, even in the latter years, except a small part of Pelican, Cole and Graves Ridge, were covered and submerged by the waters, to such an extent that the squatters all had to and did move out of the watery waste. The Government has made a desperate effort in this case to lower the water elevations of the lake below what any reasonable interpretation of the evidence can stand. If everything substantially inside of the Neal line is not lake and lake beds as plaintiff alleges in its complaint then plaintiff has succeeded in establishing that everything inside the Neal meander line belongs to the State of Oregon under the Swamp Land Act of March 12, 1860.

## COMPLAINANT'S EXCEPTIONS V AND VI.

The portion of the Special Master's Finding XXII excepted to by the complainant in its exception V, relates to the finding that the line of ordinary or mean high water at the time of the Neal 1895-6 survey was at elevation 4093. It also objects to the finding that on February 14, 1859 (the date Oregon was admitted into the Union) it was at that elevation. Oregon also excepts to the finding that on February 14, 1859, it was at that elevation, and insists that at the date Oregon was admitted into the Union the water was a great deal higher than when Neal made the survey. Defendant's Exceptions 48 and 49. In support of Oregon's contention, we cite the discussion in our opening brief, pp. 38-49, 58-63, under Defendant's Exceptions 18 and 25 and Appendices B, C, D and E in the supplement to such brief, pp. 9-30. We believe these references to the testimony and discussion amply show that Neal pressed his meander line of 1895 inward towards the waters edge as far as any authority or law requires and in complete compliance with his special instructions and the manual of 1894 and that therefore his survey must stand. The evidence shows that before the Sand Reef was cut through and for some time thereafter the waters of the lakes had a higher elevation than 4093, and certainly all the evidence establishes that when Oregon was admitted into the Union these lakes were of much greater extent and depth than that to which they were reduced when the sand reef was cut through completely and finally, due to the large run out into Harney Lake. Oregon's exceptions 48 and 49 are well taken and the complainant's exception V is not.

The discussion in Oregon's opening brief clearly establishes that the Special Master was correct when he found:

> "That with waters at the ordinary high water mark the entire bed within the Meaner Line Boundary would be covered."

Report, p. 129, part of Finding XXX. No other finding on the evidence was possible.

Complainant's statement in its brief, p. 18, that lands on both sides of the Neal line *averaged at 4093 feet* elevation is not correct, though it is true as shown on plaintiff's exhibit 3 and 3A that there are some areas outside the Neal meander line with an elevation of 4093, the elevation of the line. But this does not impair the survey. This question has long since been disposed of by this Court contrary to the contentions of the Government herein. See cases and law stated on page 39 of Oregon's opening brief. An overwhelming impression is obtained of the correctness of the Neal line by an inspection of the colored contour map, plaintiff's exhibit 3A, examined in the light of the effect for the last 15 years of drifting sand. The area in orange or salmon color has an elevation below 4093, the latter figure being the mean elevation of the Neal line. Except in the overflow areas of the Silvies and Blitzen, this exhibit shows the approximate location of the Neal line and the water's edge. In the Silvies and Blitzen rivers Neal could not follow any bank because there was none to follow as the banks were flat and liable to overflow. Its location would be aided by an inspection on the ground and undoubtedly he found here and there the tell tale mark of the salt grass sod. In 1889 after a series of dry years, Malheur Lake temporarily receded several miles and R. H. Brown testified that he was directed to follow along the salt grass where the lake was drying until he saw certain tracks start into the lake. (Abs. p. 436, l. 26-30.) This was in the Silvies River overflow region. It illustrates one of the methods the ordinary layman had of telling where the lake was in that region. Below the salt grass were the heavy tules. The inevitable logic of the Government's position, is that Neal should have run his line farther out, or made it coincide with the line of the prior surveys of 1879 and

1888 on the north side of the lake and that of 1877 on the south side of the lake in these river overflow areas, for the reason that the lake backed up near to these old lines in these two regions. But Neal surveyed these areas between the old surveys and the then present shore line in 1895 and the Government accepted his survey and patented the upland. The Government is estopped to say that the line should have ben run further out, it cannot say that it should have been run *further in* for the evidence shows that even now ordinary high waters come to the meander line, and the Government still complains because the lake rises high enough to flood and irrigae in ordinary high water seasons the patented upland adjacent to the lake. See Exh. 3A. The argument destroys itself under the facts.

## COMPLAINANT'S EXCEPTION VII.

The patents in the case at bar were as a matter of fact substantially in the form of those involved in *Hardin* v. *Jordan*, the pertinent part of which was that the description of the lots and subdivisions were given followed by the general clause "according to the official plat of the survey of said land, returned to the General Land Office by the Surveyor General." (Abs. pp. 113, l. 1, 46; p. 114, l. 41; p. 115, l. 39; p. 118 l. 26; p. 131, l. 2, 43; Defendant's Exh. X-5.) Where this phrase was not used the lands were described according to the lot numbers shown on the plats, which accordingly must be the equivalent of the above phrase.

This fact did not seem to be grasped by the Special Master, who held as to school and indemnity lands, there being no terms of a patent involved, which the state acquired without specific patents, did not come within the rule of *Hardin* v. *Jordan* as stated also in *Oklahoma* v. *Texas*. Report, p. 52. We have presented this question in our dis-

cussion of defendant's exceptions 113-118. Oregon's opening brief, pp. 181-186.

In the typical indemnity list set forth on page 101, also see p. 98, of the Master's Report, vol. 2, it is to be noted that the lands were listed to Oregon under the *lot numbers* created by the Neal survey and shown on the official plats thereof. It would seem incontrovertible that lots shown on an official plat acquired by the state as school lands or as indemnity lands would come within the rules of law stated by this Court and exemplified in the cases cited in our opening brief, p. 182.

## COMPLAINANT'S EXCEPTION VIII.

That part of the Special Master's Report on page 35, excepted to by complainant in its exception VIII, is also excepted to by Oregon in Defendant's Exception 75; and the questions of law raised by this finding relate to Oregon's second defense, namely the effect of grants without reservations or restrictions issued upon a correctly established meander line, some of which were in the form of indemnity lists issued to Oregon, see Report, vol. 2, pp. 98-99; also pp. 44, 45, 46, 47, 48, 49; also school lands, id. vol. 2, pp. 43, 52; and certain school lands referred to by the Special Master in his report if not reserved because of Executive Order. (See Oregon's Opening Brief, pp. 196, 197-198.)

The question of whether the title of the upland owner goes to the center of a non-navigable lake, if the Court shall hold the lakes to be such in this case, or stops at the waters edge, as Oregon contends is the fact both as to navigable and non-navigable meandered lakes, and hence who owns the bed is the big real property question involved in this case and is fully covered in our opening brief. Complainant would seek to evade that question by invalidating

the Neal line. Complainant's assertion that the solution of this question will not settle the issue between the United States and Oregon begs the question, as does also its assertion that this is a question between the United States and its patentees. Beyond cavil it cannot escape the issue on Mud Lake which was also meandered by Neal and on which the Government is not an upland owner; nor on the Narrows where the same condition exists, though this may be held to be a stream instead of the neck of a lake. The Bill of Complaint asserts title to the beds of Mud Lake and the Narrows. The assertion that Oregon has no interest in the Malheur Lake Division, whether a patent stops at the water's edge or goes to the center of the lake also begs the question. The Special Master found he could not evade this question, and he evaded giving Oregon as much as he could, in the absence of what he thought was a definite expression by this Court in view of the *Iowa* case (226 U. S. 460), and the *McBride* case (197 U. S. 510). So he passed on the merits and held against Oregon, erroneously as we contend. We believe also that this Court must pass on this question as it cannot be evaded on the record herein as this Court found it could do in the two cases last cited. Certainly the time has come when Oregon and the other states in the Union are entitled to know whether the United States years after a survey and years after it has conveyed the upland or substantially all the upland can come in and assert title to the beds of its inland lakes. So this exception VIII by complainant is also not well taken.

## COMPLAINANT'S EXCEPTION IX.

Those portions of the Special Master's Report set forth in this exception are also excepted to by Oregon in Defendant's Exceptions 101, 97, 45, 46, 145, 43, 44.

Exceptions 43, 44, 45 and 46 relate to the question whether there are stable lands constituting islands and/or promon-

tories within the area involved on February 14, 1859 or at the time Neal made his survey. This question is reviewed at length in Oregon's opening brief, pp. 65-78, and cross references are given to the witnesses listed in Defendant's Exceptions 18, 25, 42, 45, 47, 60 subd. b, and appendices B, C, D and E in the Supplement to Oregon's opening brief. We believe a careful analysis of the testimony pointed out in these exceptions and the argument in the opening brief will dispose of the Government's contentions.

The evidence referred to by Oregon with the depths of water shown by the testimony shows all but three of these so-called islands continually submerged. A few interested witnesses claimed that they never saw Pelican Island or Cole Island or Graves Ridge submerged. Yet as we have pointed out in the opening brief the naturalist Finley who with a Government man made an inspection of Malheur Lake in 1908 and who caused President Roosevelt to issue the proclamation found a matted mass of tules on top of Pelican Island, the highest point in the entire group and tules are a water plant that only grow in water. A few witnesses refer to Cole Island as a continuation of Dunn Island and both a peninsula sticking out into the lake in recent years. Dodge, Cooper, McConnell and Smith found it under the ice in 1914. The Special Master because he found the Neal line accurately run as the evidence conclusively shows was a fact, and because the mean elevation of that line was 4093 feet, then drew the legal conclusion that everything above 4093 was land and not the bed of the lakes, a conclusion entirely at variance with the authorities and entirely at variance with the testimony showing the heights of the lake most of the time in the earlier days and in the ordinary seasons of high water in more recent years. The water mark on the rock in Springer's Sod House Spring created by years of standing water is 4094.6, a height leaving all of Cole Island under water, most of

Graves Ridge except 26 acres, and most of Pelican Island except 270 acres. And the evidence shows the water a whole lot higher than that. Neal's line run at mean high water does not negative higher water. Mean high water means the average of high water stages, and does not exclude ordinary higher water.

Graves Ridge, so-called, which extends out into Malheur Lake from section 2, T. 26, S. R. 32 E. North of Malheur Lake, contains about 370 acres when the lake is at elevation 4093, 131 acres when the lake is at elevation 4094 and 26 acres when the lake is at elevation 4095. (Report, Vol. 2, p. 80.) It is covered when the water is above 4095. It is quite narrow. If it is to be deemed stable land and not lake bed as we claim, then it is clear that the United States does not own it. Under repeated decisions of this Court, which make the water's edge the true meander line and the boundary of the upland owner and disregards the fact that the surveyed meander line cuts across points of land extending out into the lake, Ethel B. Graves and not the United States would be the true owner of this ridge. This identical situation existed in *Mitchell* v. *Smale*, 140 U. S. 406, 413-4, to which fact we have called attention in our opening brief. In that case a ridge extended out into the lake 220 rods of varying width up to 28 rods and of varying elevation covered with trees three feet in diameter. Yet this Court held that it belonged to the upland owner, even though the meander line cut across the peninsula. Graves Ridge in the case at bar is covered when the waters stand at slightly above 4095 elevation. Under all the decisions of this and other courts, this ridge, if not the bed of the lake as we assert, belongs to the upland owner and yet her ownership has a cloud thrown over it in this case and she has no opportunity to protect her rights because she is not a party herein. See the very illuminating opinion in *Porter* v. *Selleck*, 236 Mich. 655, involving a peninsula likewise extend-

ing out into the lake and reviewing the decisions of this Court. No better illustration can be offered of the unfairness and vice of a situation which determines that everything above 4093 is owned by the United States, without giving the upland proprietors a chance to be heard.

The ridge of Wolf Lake is also thoroughly discussed in *Hardin* v. *Jordan*, 140 U. S. 399-400, 413-414 and is held to belong to the upland owner. As to the Government's contention herein that the area within the Neal line was swamp land and is owned by the Government, what of the Act of March 12, 1860, extending the swamp land act of September 28, 1850 to Oregon? What does the following language mean used by this Court in *Hardin* v. *Jordan, supra*, p. 413-4:

> "Nor do we mean to say, that, in granting lands bordering on a non navigable lake or stream, the authorities might not formerly, by express words have limited the granted premises to the waters edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein, this cannot be done."

See also *United States* v. *Minnesota, supra*. Oregon has received no swamp lands bordering the Neal line on Malheur Lake. See report, vol. 2, pp. 39-50. And of course, if the lands inside of the Neal line were swamp lands as claimed by the Government herein instead of lake bed lands as it pleads in its complaint, the right of Oregon thereto is superior to the Executive Order of 1908, and long anterior thereto.

One of the best commentaries on the so-called islands in Malheur Lake is made by J. H. Neal, the Government surveyor in his field notes of the official survey. He describes that part of Malheur Lake *bordering* T. 26 S., Rg. 31 E. W.

M. north of Malheur Lake as "very shallow, and is properly a marsh, largely covered with heavy tules and other *acquatic* vegetation . . . . On some of the higher portions, swamp hay is cut *if the season happens to be dry.*" Plff's Exh. 39-A, p. 31-32. Undoubtedly all of the shallow lakes in the west are marsh like along their borders, but ordinary high waters extend into or beyond them and such borders are nevertheless, as disclosed from the cases in our opening brief, parts of the beds of the lakes.

Neal was unprejudiced, he was an experienced Harney County engineer, thoroughly familiar with the area and in fact had run the 1888 survey line under instructions from the Government in Tp. 25 S. R. 32½ E. north of the lake, and his commentary that in 1895 swamp hay was cut on the higher portions in the lake if the season happened to be dry is a more accurate picture than any in the record. Except in dry years, fourteen years after the Sand Reef was cut through the waters of the lake were too high to permit swamp hay to be cut even on the higher portions, the so-called islands. This is proof conclusively that Neal did not overlook the so-called islands in the lake, but he did not consider them true or stable islands, they were a part of the bed of the lake and returned as such. The Department of the Interior was informed of that fact, they sent Newby as we have seen to check up on Neal's survey and he found it correct. Exh. X-10.

The Government had John H. Neal subpoenaed as a witness and present during the taking of the testimony before the Special Master. Report, p. 26. He more than any other man could have told about his survey, his training, his knowledge and the facts of this lake as he knew them. The Government did not call him as a witness. We are entitled to the usual presumptions arising therefrom that he would have damaged or destroyed its case.

The Special Master declared everything within Malheur Lake above 4093 as stable islands owned by the United States. This opinion flies in the face of the practice in the General Land Office from its beginning. In Robert L. Shepherd, 32 L. D. 474, 476-7, the Secretary of the Interior held that applicants for surveys of islands situated within lakes must *serve notice* upon the *owners of the opposite shores* and *upon the State authorities*, giving them an opportunity to present objections and an opportunity to be heard and holding that a survey once made and approved

> "raises such a strong presumption in favor of the correctness of such survey that no additional surveys should be made, except upon clear proof of evident mistake or fraudulent conduct on the part of those charged with the execution of the surveys."

In *Frank Level*, 21 L. D. 290, 292, the department refused to survey a tract which was joined to the upland when the water was low and was an island when the water was high.

In *John C. Christensen*, 25 L. D. 413, the Department refused to survey islands under authority of *Grand Rapids and Indiana Railroad Co.* v. *Butler*, 159 U. S. 87, in which case the evidence left it uncertain whether the so-called island was more than a low sand bar covered a good part of the year with water at the time of the survey of the adjacent lands, which was in the year of the State's admission into the Union and this Court said:

> "We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate fraud or mistake."

The *Butler* case, *supra*, is cited with approval by this Court in *Scott* v. *Lattig*, 227 U. S. 229, 244, and the Court said in the latter case, p. 241:

"That it (an island) was there at the time of the survey seems certain, although this is not so important as its existence when Idaho became a state."

In *Emma S. Peterson*, 39 L. D. 566, 571, the General Land Office refused to survey an island stating:

"Where an approved township survey purports to show that all public lands within the limits of such township have been surveyed, it raises a strong presumption that no public lands were omitted from survey and no additional surveys should therafter be allowed, except upon clear and convincing proofs of the existence of the lands at the date of the township survey *and* of the admission of the State into the Union." Citing *George S. Whitaker*, 32 L. D. 329, 331, to the same effect.

In *Arthur Savard*, 50 L. D. 381, the Department refused to survey a tract where the original meander line was 7.20 chains north of the bank of a channel 40 to 50 links wide and 19 chains north of the left bank of the main channel of the river. The area between the small and main channels made up a group of islands which were such only at high water and at other times they were attached to and formed part of the mainland through the drying up of the small channel. Citing *United States* v. *Lane*, 260 U. S. 662.

In *J. Callahan*, 32 L. D. 542, 3, the Department refused to resurvey a lake though ridges were situated therein having elevations 11.4, 6.5, 7.8, 6.7, 7.0, 14.3, 7.3 and 7.0 feet, respectively, above water level and covered with cotton wood trees.

An inspection of Appendix 14, Report: vol. 2, pp. 75-77, shows the area inside the lake above 4095 except on Pelican Island is negligable. The percentages are obtained by adding the percentages after column D to the percentages after column E, and subtracting the sum from the percentages after the column F. In the total area of 48,103 acres

inside the Neal meander line of Malheur Lake only 1.4% is above 4095, including all the knolls so-called in the lake, Pelican, Cole and Graves Island or Ridge.

Neal and the prior Government surveyors who ran the surveys of 1875, 1877, 1879 and 1888 were right in refusing in their returns to report any islands in the lake.

Government's comment on the Special Master's finding XXII, Report, p. 121 that he could not furnish similar tables on Harney Lake. It is because the contour lines of Exh. 4 show no elevations above 4093 and neither does Mud Lake. In fact Curtis Elliot who owned lands bordering Mud Lake and lived there for years, testified as a Government witness and said: "There were no islands out in Mud Lake proper." Abs. p. 797, l. 5.

Oregon's exceptions 43, 44, 45 and 46 should be sustained and complainant's exception IX overruled.

If there are any ridges or promontories of high dry land extending from the patented upland into Malheur Lake, they belong to the riparian owner under rules of law enunciated by this Court and repeated in Oregon decisions, and they do not belong to the United States, for the water and not the meander line is the true boundary. There is not a single true island in Malheur Lake, unless it be a small part of Pelican Island and as to that island we find Finley showing that in 1908 and prior thereto it was growing tules on its top.

The conclusion of the Special Master that everything above 4093 constitutes stable lands and belong to the United States in any and all events, is based upon the erroneous premise that because the Neal meander line has a mean elevation of 4093 that that elevation is the line of demarcation between lake and land. It is true that the Government is estopped from claiming any lands which it has patented abutting on the meander line though such lands may be of

no higher elevation than the meander line as shown by Exhibit 3A the colored contour map. (See Oregon's Opening Brief, p. 39.) But the water's edge is the true meander line and the water also rises far above 4093 and the evidence conclusively shows that all these so-called islands or knolls are covered even in these latter years in the spring and early summer months, whenever, as reliction witness Campbell said in speaking of his own squatter's claim in the lake, tracts 14 and 15, shown on Pliff's Exh. 22. (Report: vol. 2, p. 75) "there was enough water to say anything about." Abs. p. 544, l. 25. And his squatter's claim is typical of the so-called islands and in fact is higher than many. The tops of the islands are swamps if not lake beds.

Prior to 1915 the evidence shows there was plenty of water. Under defendant's exception 47 the testimony is referred to which in fact is a part of the Government's own case herein, and proves conclusively that these so called islands are covered with the waters of the lake regularly, consistently and annually in the spring rises. The evidence further shows that the higher portions of the higher islands are covered with salt grass, a vegetation indicative of an area covered with water in the spring, as shown in exception 60, subd. b and witnesses listed thereunder. See the interesting discussion of the lake involved in *United States* v. *Rhodes*, 3 Fed. (2nd) 744, 775 (2, 3), (4). (C. C. A. 8th Cir.)

The Government in this case is claiming Pelican Island and the other so-called islands, together with alleged riparian rights around them, and apparently claiming lands added to the upland or to islands by reliction is a riparian right. This brings squarely into issue the contention of Oregon herein that there has been no permanent reliction on these lakes, a question which the Special Master refused to pass on. Report, p. 28, 31, and which refusal is the subject of Oregon's exceptions 63, 64, 65, 66, 68 and 69. The

proof shows that in 1922 and 1928, during a slight break in the dry cycle, the waters of the lake came approximately to the Neal line, which disproves any theory of reliction. The matter is presented fully in Oregon's opening brief, pp. 81-85.

If there is no reliction, no one can claim any title by reliction and Oregon asserts that the right to future accretion or reliction is not a riparian or a vested right. *Western Pacific Railroad Company* v. *Southern Pacific Co.*, 151 Fed. 376, 399, (C. C. A. 9th. Cir.); *Eisenbach* v. *Hatfield*, 2 Wash. 236, 253, 12 L. R. A. 632, 641, 642, a case cited with approval by the supreme court of Oregon in *Oregon and Pacific Elevator Co.* v. *Portland*, 65 Or. 349, 394. In *Caulfield* v. *Smyth*, 69 Or. 41, 49, relating to lands on Malheur Lake, and excerpts from the record were offered in evidence herein as Plff's Exh. 59, Abs. pp. 247-261, and as Dft's Exh. X-4, Abs. 246 (to show that the private litigants conceded Malheur Lake was non-navigable and so the question was not presented for adjudication, and in which a claim was unsuccessfully made of ownership to the center of the lake), the Oregon Supreme Court held:

> "Until legislation of the state has changed its policy on this point, we must hold that the riparian owner of land granted by the general Government abutting upon a correctly established meander line, is at least entitled to follow the water of the lake or river thus meandered, no matter how far it may recede."

This would seem to be a clear cut statement that in Oregon the right to future reliction is not a vested right. The study of what are vested riparian rights is one of great difficulty and of great conflict. It may be that the right of access so long as water exists may be one of such rights. The question may one day have to be settled if Oregon seeks to dispose of its lake bed lands, and until it does the ques-

tion does not need to be passed on, it appears. A conclusive answer to the Government's claim to reliefed lands herein is that there has been no reliction or permanent recession of the waters. If all reports are true it is likely that the Neal line will be reached this spring by the waters of the lakes, but that is not before this Court.

The Special Master refused to make a finding on the question of reliction because he feared that such a finding while it would not be technically binding upon third parties in practical effect would come to the same end. Report, p. 31. See defendant's exceptions 67 and 69.

In making a finding that there were stable islands inside of the lake and that they belonged to the United States, he and this Court if it accepts such ruling would likewise in practical effect do more damage to the riparian owners and squatters than could possibly result upon a finding on the question of reliction. It illustrates the vice of deciding important questions of law without all parties interested before the Court. This Court should not countenance the Government's effort to get rulings from this Court, which it can claim in practical effect shows that settlers and riparian owners have no rights and use the same as a club to force them to settle or to defend innumerable costly several suits in the district court. These persons should be brought into this suit.

## CONCLUSION.

For fifteen years Oregon and its attorneys have been working on this case; efforts have been made to work out the matter with the Government. But administrations come and go. There is not a single attorney who represented the Government in the early stages of this matter before suit was brought now in this case and none who tried the case before the Master are in it now.

The big questions involved herein cry aloud for an opinion on the merits. The Government has spent vast sums in this case and so has Oregon and we respectfully ask that it be determined whether these lakes are navigable or non navigable. If navigable Oregon owns the beds. If non-navigable, then this Court should finally settle what is the effect of a grant of upland abutting upon a correctly established meander line where such grant is without reservations or restrictions.

This is the question in which Oregon and other states are vitally interested. If it is not settled herein, years of preparation in this case, extensive and exhaustive study of the cases, vast expense will all have been for naught.

If the Government wins in this case it means that though as to Malheur, Mud and Harney Lakes, a public purpose will be subserved in making a reservation for migratory wild water fowl, an object for which the State of Oregon is sympathetic as evidenced by Chap. 228, Laws of Oregon, 1931 (See Report, Supp. p. xiii), though it contends that the area is big enough for a game refuge and other purposes, (and in Oregon an election under the Initiative and Referendum laws to determine whether the area should be ceded to the United States and in which the issues were "Birds or Babies" resulted in victory for the latter), it also means that the Government can make similar assertions to other inland lakes, cause them to be surveyed and the beds patented and so made into private ponds where neither hunting, fishing nor boating will be permitted.

In the view of such contingencies, we ask the Court again to consider *Bristow* v. *Cormican*, L. R. 3 Appeal Cases 641, which is the basic authority under *Hardin* v. *Jordan*, for giving ownership to private proprietors of the beds of lakes, and Mr. Justice Brewer's dissenting opinion in the latter case as to what was decided in that case, p. 404, 405, line 22.

What was *not decided* in the *Bristow* case is apparent from the following excerpts therefrom. The Lord Chancellor, Lord Cairns, on page 651 of this case said:

> "The defendants in the action, the respondents, had pleaded a special defense alleging that Lough Neagh was a public or common navigable inland sea, and that every subject of the realm had a right of fishing in it and justifying their trespass under this right. To this specific defense there was a replication averring that the tides of the sea had never flowed in Lough Neagh and to this replication there was a demurrer, which demurrer was overruled. *Against the order overruling this demurrer the Respondents have not appealed* and the Appellants remain therefor the victors on that issue. My Lords I mention this in order to shew that *it does not appear to me that your Lordships can in this case decide whether the replication* to which I have referred *was, or was not a valid defense* in law. That may be a fit question to raise in some other cause; but it cannot for the reasons I have mentioned, be raised in this case."

In the same case Lord Blackburn said, page 666-667 with reference to whether the law giving the upland owner to the center of a running stream of water should be applied to this lake:

> "I own myself to be unable to see any reason why the law should not be the same, at least *where the lake is so small, or the adjoining manor so large, that the whole lake is included in one property.* Whether the rule that each adjoining proprietor where there are several is entitled usque ad filum aquae should apply to a lake is a different question. It does not seem very convenient that each proprietor of a few acres fronting on Lough Neagh should have a piece of the soil of the lough many miles in length tacked on to his front-

age. But no question arises in this case as to the rights of the riparian owners amongst themselves for no title is made by either party through any one as riparian owner."

Lord Gordon said, p. 671:

"On the important question as to the *right of the public to fish on an inland navigable and non-tidal lake,* which though raised in the court below, is not now properly before the House, *I say nothing.*"

In the light of those portions of the opinion which we have caused to be italicised, is it any wonder the State courts have refused on the ground of their right to declare local law, to accept this Court's interpretation of *Bristow* v. *Cormican,* though it seems to us to be chiefly distinguished for what it did not decide, and have asserted the public right of control of what might be ordinarily deemed to be non-navigable lakes within their borders, have refused to recognize private ownership to the beds thereof, though asserted under patents from the United States, have preserved the public right of navigation of such lakes in row boats for pleasure, fishing and hunting, though such lakes do not come within this Court's definition of navigable waters? Does not Oregon have the same right as to the Narrows and Mud Lake on which the United States is not a riparian owner? Does it have the same right to three-fourths of Malheur Lake fronting the patented and granted uplands?

We see now why the Special Master wondered if lakes "of the character and size of Malheur and Harney Lakes" came within the rule of *Bristow* v. *Cormican* as interpreted by this Court in *Hardin* v. *Jordan.* See Oregon's Exceptions 81 and 82, and discussion in its brief. P. 101. We see now why the Supreme Court of Illinois in *Fuller* v. *Shedd,*

161 Ill. 462, 482, 488-490, refused to grant title to the upland owners. An instructive analysis of *Bristow* v. *Cormican* is found in *Welder* v. *State,* 196 S. W. 868, 871 and *Boardman* v. *Scott,* 102 Ga. 404, 410-414, 30 S. E. 982, 984-987, where these courts interpret the *Bristow* case differently from that of this Court.

We assert as this Court has said in *Kansas* v. *Colorado,* 206 U. S. 46, 93, and repeated in *McGilvra* v. *Ross,* 215 U. S. 70, 78-9 that

> "Each state has full jurisdiction over the lands within its borders, including the beds of streams and *other waters.*"

It is this right and jurisdiction which the plaintiff seeks to take from the defendant in this case.

For the reasons above specified, the complainant's exceptions filed herein January 16, 1935, should be overruled.

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